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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAY H. GLASSER,

Petitioner,

v.

A.H. ROBINS COMPANY, INC. and
DALKON SHIELD CLAIMANTS TRUST,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI and APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

In 1986 and 1987, the District Court entered three protective orders, prohibiting disclosure of confidential data about "Dalkon-Shield" cases contained in the so-called "Closed Files" of the A.H. Robins Company, Inc., that were to be made available to certain court-appointed experts, including petitioner Jay Howard Glasser. In 1987, some of this data was disclosed in testimony in open court. In 1989, after Dr. Glasser's service as an expert had ended, the District Court entered a fourth order (affirmed by the Court of Appeals) purporting to "interpret" the original three orders as precluding Dr. Glasser from

- using knowledge and experience he acquired prior to his activities as a court-appointed expert,
- using information from the "Closed Files" that had been publicized in open court, or information from other public sources, or
- acting in any manner or capacity

to assist Dalkon-Shield victims in ways adverse to respondents A.H. Robins Company, Inc. or the Dalkon Shield Claimants Trust. (The original three orders had been completely silent on these matters.)

In these circumstances, did the District Court's 1989 order constitute:

I. an abuse of discretion under Federal Rule of Civil Procedure 26(c), as an attempt to enter a protective order both *ex post facto* and without "good cause"; and

II. a prior restraint repugnant to the First Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, the judgment of which is here for review, include:

1. petitioner Jay Howard Glasser, appellant in the Court of Appeals; and

2. respondents A.H. Robins Company, Inc., appellee, and Dalkon Shield Claimants Trust, intervenor-appellee, in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Part III of the Rules of this Court, Jay Howard Glasser ("Dr. Glasser") petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion the Court of Appeals issued in support of its judgment is reported at 950 F.2d 147, and appears in the Appendix hereto ("Pet. App.") at 1a. The opinion of the District Court is unreported, and appears in Pet. App. at 10a.

JURISDICTION

The Court of Appeals entered its judgment on 15 November 1991, and denied Dr. Glasser's petition for rehearing and for rehearing *en banc* on 8 January 1992 (Pet. App. at 7a). This petition is timely under this Court's Rule 13.4.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE OF COURT INVOLVED

This case involves application of the First Amendment to the Constitution of the United States and Federal Rule of Civil Procedure 26(c) ("FRCP 26(c)"), the texts of which appear in Pet. App. at 63a.

STATEMENT OF THE CASE

Dr. Glasser seeks review of the judgment of the Court of Appeals, affirming the District Court's decision that he violated certain protective orders. Dr. Glasser contends that: (i) the District Court misapplied FRCP 26(c) and violated the First Amendment, in disregard of *Seattle Times Co.* v. *Rinehart*[1]; and (ii) in affirming the District Court, the Court of Appeals failed to perform its duty of *de novo* review under *Bose Corporation* v. *Consumers Union of United States, Inc.*[2]

In 1985, respondent A.H. Robins Company ("Robins") petitioned for bankruptcy because of thousands of lawsuits over its faulty "Dalkon Shield" birth-control device.[3] Formulating a plan of reorganization, the District Court sought to estimate the value of unliquidated claims that eventually would be handled through respondent Dalkon Shield Claimants Trust ("Trust"). To represent claimants, the court

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[1] 467 U.S. 20 (1984).

[2] 466 U.S. 485 (1984).

[3] The pertinent history appears in *Manard-Sanford* v. *Mabey*, 880 F.2d 694, 696 & n.1 (4th Cir. 1989).

created a committee, which received approval to retain experts. Among these was Dr. Glasser, whom the committee described as "a biostatistician" with broad experience, adding that

> Dr. Glasser's thorough and current familiarity with the medical literature concerning the Dalkon Shield and his experience in drafting survey questionnaires make him especially qualified to assist * * * in evaluating the Dalkon Shield claims.[4]

Because the experts, including Dr. Glasser, had access to files from lawsuits and claims resolved prior to the bankruptcy (the "Closed Files"), in 1986 and 1987 the District Court entered three protective orders precluding disclosure of the files' contents to unauthorized persons.[5] None of these orders, however, purported to prevent an expert from using

- knowledge, training, or experience relevant to Dalkon-Shield cases that he had acquired *prior* to his appointment, or
- such knowledge he acquired *during* the period of his appointment, but from *public* sources

to "represen[t], in any manner or capacity, * * * any interest [of Dalkon-Shield victims] adverse to Robins or the Trust" *after* his appointment ended, as the District Court applied the orders to Dr. Glasser in its opinion of 19 July 1989.[6]

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[4] Pet. App. at 45a-46a.

[5] *Id.* at 49a (10 July 1986), 52a (18 September 1986), and 55a (26 June 1987).

[6] *Id.* at 15a. In that opinion, the court retrospectively explained that

> the Closed files contained information concerning the exact dollar amounts of judgments and settlements received by individual claimants * * * which was of crucial importance in reaching a valid estimate of Robins' total Dalkon Shield-related liability. * * * [P]ossession of this information, however, would also be useful to anyone representing Dalkon Shield claimants

In late 1987, the District Court held open hearings at which experts gave detailed testimony on statistical data derived in part from the Closed Files. The press prominently reported this testimony.[7]

During 1988, Dr. Glasser and John E. Lawson, Jr., established Medical Claims Consultants ("MCC") "to provide an efficient, equitable and cost effective service to assist Dalkon Shield Claimants with the evaluation, assembly and filing of their claims".[8] MCC never affected any special

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> in negotiations with or litigation against the Trust. Knowing the historical values placed upon particular types of injuries * * * would give a claimant a "leg up" on others in making demand for compensation upon the Trust.

Id. at 14a. The court neglected to note, however, that the protective orders did not preclude an expert from representing Dalkon-Shield victims after the period of his appointment where he used only "historical values" already legitimately publicized by others.

[7] *E.g.*, "Robins Valuations Far Apart", *The New York Times*, 6 November 1987, at D-4; "Dalkon Shield Victims Estimate Claims Up to $7 Billion, 4 Times Robins's Offer", *The Wall Street Journal*, 6 November 1987, at 16; "Doctors Testify in Hearing On IUD Compensation Fund", *The Washington Post*, 7 November 1987, at D1; "Robins May See Liability Exceed Its Own Figure", *The Wall Street Journal*, 9 November 1987, at 6.

[8] Letter of J.E. Lawson, Jr., to M.M. Sheppard, Director, Dalkon Shield Claimants Trust (28 December 1988), in Pet. App. at 57a. Based on a survey of Dalkon-Shield victims "whose names and addresses [MCC's founders] purchased" in the open market, MCC aimed to help victims, in an essentially *procedural* manner, by:

> a. Identifying and evaluating the nature and extent of the injuries they sustained (including a medical review * * *);
>
> b. Assembling and deciphering the necessary documentation (i.e., medical records) to substantiate the injuries * * *;
>
> c. Preparing the claim forms, application and other materials required by the Trust;
>
> d. Filing the claims with the Trust;
>
> e. Monitoring the progress of their claim as it is being processed by the Trust; and
>
> f. Obtaining any additional materials or documentation required by the Trust to substantiate the claim.

Id. at 58a, 59a.

qualification to perform these functions solely because of Dr. Glasser's participation as an expert in the Robins' case. Neither did MCC conceal its activities from the District Court or the Trust. To the contrary: Lawson provided detailed particulars about MCC to the Director of the Trust.[9] And MCC was the subject of an article in the local press.[10]

In 1989, Robins charged Dr. Glasser with improperly using information from the Closed Files in his work with MCC.[11] The day before Robins filed its motion, on his own initiative the District Court Judge advised Dr. Glasser to move for release from the protective orders.[12] Dr. Glasser did so,[13] whereupon the District Court held Robins' motion in abeyance pending a hearing on Dr. Glasser's motion.[14] In his papers, Dr. Glasser emphasized that he had only "reluctantly" filed his motion

> to affirm * * * that I have abided by the protective orders, and that * * * my work with [MCC] * * * has not abridged this protective order in fact or in spirit. * * *
>
> I have not sought release from the protective orders in the past because I have observed and continue to abide by the protective order. I have come before the Court, only because A.H. Robins has filed a motion to show cause * * * . I have therefore requested a hearing to determine that I have not * * * violated the protective order.

---

[9] *Id.* at 57a.

[10] "Discount Service Helps Victims File Dalkon Claims", *The Washington Post*, 24 April 1989, at 5.

[11] Motion for Show Cause Order and Supporting Memorandum, *In re* A.H. Robins Company, Inc., Chapter 11 Case No. 85-01307-R (E.D. Va., filed 22 June 1989), Docket No. 6534.

[12] Pet. App. at 17a, 34a.

[13] Docket No. 6535.

[14] Docket Nos. 6537-6539.

Therefore I am placed in a position to seek release from an order that I have neither violated, nor intend to violate.[15]

At the hearing, Dr. Glasser testified that

- "no [confidential data from the Closed Files] has ever been divulged to anyone even within [MCC]";
- "[w]e didn't need the confidential data to [set up the procedures MCC used]";
- MCC's system is "independent of any of the [confidential] data * * *, not independent of my experience, but independent of the data";
- "the data that were available quite apart from the data covered under the protective order can in fact be used to model the claims [of Dalkon-Shield victims assisted by MCC]";
- "the important epidemiological and statistical profiles that we [at MCC] do * * * are not dependent on the data from the closed claims files";
- "we have been using averages [generated from the historic data covered by the protective orders], but these averages were by types of injury that were produced in open court"; and
- "the data [from the Closed Files] that are really used * * * came out in the public hearing, * * * only that which * * * has been heard publicly and viewed publicly".[16]

Asked how he "kn[e]w of pitfalls in the data" in the Closed Files, Dr. Glasser answered that "those [pitfalls] are the ones that would historically be associated with retrospec-

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[15] Supporting Memorandum for the Hearing on the Release from Protective Order: Jay H. Glasser, PhD, *In re* A.H. Robins Company, Inc., Chapter 11 Case No. 85-01307-R (E.D. Va., filed 23 June 1989), Docket No. 6535, at 1-2.

[16] Pet. App. at 24a, 24a, 22a, 22a, 30a, 29a, 20a.

tive data collection"; "it would be in every person's first lecture on the uses of medical and epidemiological data from retrospective studies".[17] And, challenged as to whether the statement in MCC's "agency agreement" that it would "estimate the * * * claim as compared to historical claims" implied that MCC intended "to compare the medical information [its clients] provide * * * to the historical value of claims [in the Closed Files]", Dr. Glasser explained that the agreement merely "follows the language of the claims resolution facility", and that "the trust is going to provide guidelines for that".[18] Robins presented no witness of its own.

Notwithstanding Dr. Glasser's uncontroverted testimony that MCC's work did not depend on still-confidential data from the Closed Files, the District Court ruled that Dr. Glasser

> will not be relieved from the protective order. * * * [O]ur view is that the *spirit* of the protective order, *if not the actual language*, is that it is inappropriate for any expert * * * to utilize *any* information from *whatever* source that they gathered during their services as a court-appointed expert.[19]

The court then promised to

> get a memorandum out spelling out our view as to what the *spirit* of this protective order is.
>
> Maybe we are partly to blame ourselves. *Maybe we should have said in the very beginning*, if you take a job here as an expert, you are forever out of the Dalkon Shield business.[20]

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[17] *Id.* at 26a, 27a.

[18] *Id.* at 28a. *See* Sixth Amended and Restated Disclosure Statement (28 March 1988), *In re* A.H. Robins Company, Inc., Chapter 11 Case No. 85-01307-R (E.D. Va.), Plan Exhibit C, at CFR-2: "(ii) by comparing the profile to corresponding profiles based on historic data".

[19] Pet. App. at 40a-41a (emphasis supplied).

[20] *Id.* at 41a (emphasis supplied).

In its opinion of 19 July 1989, although the court noted that the protective orders were designed to block release of "personal details of the cases of individual claimants" and "the historical values placed upon particular types of injuries",[21] it did not find that Dr. Glasser had used any such "personal details" or any "historical values" other than averages and other statistical aggregates that had been published in open court. Instead, the court rehearsed what Robins' counsel "asserted", "contended", "alleged", and "claimed" (but never introduced evidence tending to prove),[22] and

> found itself in agreement with Robins' contention. In representing Dalkon Shield claimants and advising them as to the values of the claims, Glasser has necessarily utilized information gleaned from the Closed Files. * * * It is simply impermissible for Glasser and his clients to use protected information, when other claimants and their representatives are forbidden access to it.
>
> * * * [Dr. Glasser's] conduct constitutes a clear violation of both the letter and the spirit of the protective orders, and he must desist in using Closed File data to represent claimants.
>
> * * * Even if Glasser's computer model [used by MCC] were destroyed, and all Closed File records returned, Glasser's knowledge would remain. He cannot forget that which he learned as a result of being a Court expert. * * *
>
> * * * Glasser's continued representation, in any manner or capacity, of any interest adverse to Robins or the Trust will constitute a violation of the protective orders. As such, the Court will authorize Robins to revive its motion [to hold Dr. Glasser in contempt] if it perceives continued violation of these orders.[23]

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[21] *Id.* at 13a, 14a.

[22] *Id.* at 11a, 14a.

[23] *Id.* at 14a-15a.

Two days before the District Court issued its opinion, confronted with what he recognized as the intention of the District Court to enter a new protective order expanding the reach of its three previous orders, Dr. Glasser moved for leave to file a brief in opposition to the court's "modification of the protective orders", raising issues under the First and Fifth Amendments; but the court denied this motion.[24]

On appeal, the Court of Appeals affirmed on two issues consequential here. *First*, it held that the three original protective orders did apply to Dr. Glasser's activities at MCC, because the District Court "was not clearly erroneous in making" "a factual finding that 'Glasser has necessarily utilized information gleaned from the Closed Files' ". As the sole support for this ruling, the Court of Appeals quoted a single sentence from a letter of John Lawson, which stated that "I [Lawson] * * * purchased a list of names and addresses in order to test an idea that * * * [Dr. Glasser] and I had developed *as a result of his observations as a Court-appointed expert* * * * in the bankruptcy litigation".[25] *And second*, the court held that, under *Seattle Times Co.* v. *Rinehart*[26], the protective orders did not abridge Dr. Glasser's First-Amendment rights.[27]

Dr. Glasser then petitioned for rehearing and rehearing *en banc*, urging the Court of Appeals to review the record *de novo* under *Bose Corporation*[28], explaining that such a review would establish it had taken the statement in Lawson's letter wildly out of context, and reiterating that nothing in the record evidenced Dr. Glasser's use of still-

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[24] Docket Nos. 6563, 6566.

[25] 950 F.2d at 149, Pet. App. at 5a (emphasis in the original).

[26] 467 U.S. 20 (1984).

[27] 950 F.2d at 149, Pet. App. at 5a-6a.

[28] Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).

confidential data from the Closed Files. The Court of Appeals denied Dr. Glasser's petition.

This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A writ of certiorari should issue in this case for at least two reasons: *First*, the Court of Appeals has decided the questions presented here "in a way that conflicts with applicable decisions of this Court".[29] *Seattle Times Co.* held that if a protective order under FRCP 26(c) "is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of information if gained from other sources, it does not offend the First Amendment".[30] Here, the District Court's order of 19 July 1989 (as affirmed by the Court of Appeals) imposes on Dr. Glasser's conduct *new* limitations without any "showing of good cause" under FRCP 26(c), but instead as divinations of the "spirit" of the earlier three protective orders. These limitations are wide-ranging. And they directly address not only "the dissemination of information * * * gained" from sources other than the still-confidential data in the Closed Files, but also information and professional expertise not even arguably connected with Dr. Glasser's service as an expert.[31]

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[29] Rule of the Supreme Court of the United States 10.1(c).

[30] 467 U.S. at 37. Revealingly, the Court of Appeals quoted this very language, but failed to address the qualification "if gained from other sources". 950 F.2d at 149, Pet. App. at 5a-6a.

[31] Included within this assignment of error is the Court of Appeals' refusal to review the record *de novo* under *Bose Corporation*, and its choice instead to wrench out of context a single sentence from a lengthy letter so as to rationalize "the district court's factual findings [as] not clearly erroneous". 950 F.2d at 149, Pet. App. at 5a. When this Court reads for itself the entire letter (in Pet. App. at 57a), it will conclude that the line upon which the Court of Appeals seizes lacks any plausible connection to confidential data from the Closed Files. To the contrary: The "idea" that Dr. Glasser and Mr. Lawson "developed as a result of [Dr. Glasser's] observations as a Court-appointed expert" was a

Second, the Court of Appeals "has rendered a decision in conflict with the decision of another United States court of appeals in the same matter",[32] *National Polymer Products, Inc.* v. *Borg-Warner Corp*[33], as to when an order under FRCP 26(c) constitutes a forbidden prior restraint on speech.

These errors not only seriously harm Dr. Glasser professionally, but also inject into the jurisprudence of FRCP 26(c) and the First Amendment the perverse precepts that protective orders may be generated *ex post facto*; that such orders may preclude individuals from using information already in the public domain; and that appellate courts may disregard the character of these orders as prior restraints if they can dredge up anything in the record that, yanked out of context and unexamined *de novo*, might colorably rationalize a district court's "findings" as not "clearly erroneous".

I. The District Court's order of 19 July 1989 lacks "good cause" under Federal Rule of Civil Procedure 26(c).

The District Court's order of 19 July 1989 (the "1989 order") is a *new*, *retroactive* protective order, not a *bona fide* interpretation of its previous orders.[34] For that reason,

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procedural mechanism "to provide an efficient, equitable and cost effective service to assist Dalkon Shield Claimants with the evaluation, assembly and filing of their claims", *not* a plan to use still-protected *substantive* data from the Closed Files.

[32] Rule of the Supreme Court of the United States 10.1(a).

[33] 641 F.2d 418 (6th Cir. 1981). As did *National Polymer*, *Seattle Times Co.* involved the use of supposedly protected information by a litigant; but the Court of Appeals saw "no reason why the rule [in the latter case] would not be equally applicable to a court-appointed expert". 950 F.2d at 149, Pet. App. at 6a. There is equally "no reason" why *National Polymer*, too, should not apply here.

[34] As the District Court itself admitted, "[m]aybe we should have said in the very beginning" what it said only in July of 1989. This earlier silence compelled the court to consult "the *spirit* of the [previous] protective order[s], *if not the actual language*", to rule against Dr. Glasser. Pet. App. at 41a, 40a-41a (emphasis supplied).

this Court should first consider, as a nonconstitutional ground for reversal, the District Court's abuse of discretion in the entry of an *ex post facto* order under FRCP 26(c).[35]

A. The extreme breadth of the 1989 order. Dr. Glasser faces contempt if he uses *already disclosed* data from the Closed Files that any other member of the general public may use with impunity. Moreover, Dr. Glasser must speculate as to:

- what the District Court, Robins, or the Trust may deem information "he learned as a result of being a court expert";[36]
- what "information * * * gleaned from the Closed Files" he may be attacked for "necessarily utiliz[ing]" *in futuro*;[37]
- which of his future actions may be interpreted as "representation, in any manner or capacity, of any interest adverse to Robins or the Trust";[38] and
- whether he may
  - * serve as an expert appointed by another court in litigation involving the Dalkon Shield;
  - * testify as an expert witness;
  - * offer expert advice out of court upon the unsolicited request of third parties;
  - * lecture, participate in seminars or conferences, publish articles in scholarly journals, review manuscripts of others, or give interviews on professional subjects related to the Dalkon Shield; or even

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[35] *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981). Absence of "good cause", of course, is one of the elements of the *Seattle Times Co.* analysis. 467 U.S. at 37.

[36] Pet. App. at 15a.

[37] *Id.* at 14a.

[38] *Id.* at 15a.

* publicly state his professional opinions on the subject.

Thus, to insulate himself from harassment under the 1989 order, Dr. Glasser *must desist completely from any professional activity relating to the Dalkon Shield.*[39] Inasmuch as Dr. Glasser was originally selected as an expert because of his "thorough and current familiarity with the medical literature concerning the Dalkon Shield and his experience in drafting survey questionnaires" that *preceded* his access to the Closed Files,[40] the 1989 order effectively strips him of *pre*-existing rights to use professional knowledge and experience with no possible connection to information from that source.

B. The *ex post facto* character of the 1989 order. The first three protective orders preclude disclosure of confidential data *from the Closed Files only*. None of them prohibits an expert, after his service to the court ends, from using knowledge, training, or experience relevant to the Dalkon Shield that he acquired

- *prior* to access to the Closed Files;
- during the period of his appointment, but which derived from *public* sources *unconnected to* the Closed Files; or
- from data derived from the Closed Files that had been legitimately disclosed in open court.[41]

Furthermore, none of these orders addresses an expert's later "representation, in any manner or capacity, of any interest adverse to Robins or the Trust".

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[39] As the District court warned Dr. Glasser, "you just simply are not going to be able to do anything in connection with this"; "you are forever out of the Dalkon Shield business". *Id.* at 41a.

[40] *Id.* at 46a.

[41] In the first two cases, no "disclosure" is involved, by hypothesis. In the third, the court's own permission of the disclosure moots the protective orders *pro tanto*. *E.g.*, the third protective order *allows* disclosure to "such * * * parties deemed necessary by counsel to fulfill their obligations to their respective client and the Court". *Id.* at 56a.

The District Court conceded as much *sotto voce* when it said that "our view is that the *spirit* of the protective order, *if not the actual language*, is that it is inappropriate. . ." and so on;[42] and when it mused that

> [m]aybe we are partly to blame ourselves. *Maybe we should have said in the very beginning*, if you take a job here as an expert, you are forever out of the Dalkon Shield business.[43]

Moreover, an *ex post facto* rewriting of the protective orders cannot be rationalized on the theory that, by accepting an appointment as an expert with notice of those orders, Dr. Glasser "waived" any right to complain about how the District Court might later interpret their "spirit". *First*, Dr. Glasser's rights of free speech are involved. And "a court cannot condition the 'privilege' of access [to discovery materials] on a waiver of First Amendment rights".[44] So, no theory of "automatic waiver" is admissible here. *Second*, there is a strong presumption against the actual waiver of constitutional rights.[45] *And third*, to support such a waiver, it must be "clearly established" with "circumstances * * * clear and compelling" that there has been "an intentional relinquishment or abandonment of a known right or privilege".[46]

This Court will search the record in vain for evidence that in 1986 and 1987 Dr. Glasser intentionally relinquished the rights the District Court suddenly "spirited" away from him in July of 1989.[47]

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[42] *Id.* at 40a-41a (emphasis supplied).

[43] *Id.* at 41a (emphasis supplied).

[44] *In re* Halkin, 598 F.2d 176, 190 (D.C. Cir. 1979).

[45] Brookhart v. Janis, 384 U.S. 1, 4 (1966).

[46] *Id.* at 4; Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[47] If the District Court subjectively believed at the time of their issuance that the original protective orders were "spiritually" capable of its later interpretation, it concealed this view from Dr. Glasser, denying him the opportunity to make an *informed* consent to the limitations the orders supposedly imposed.

C. The absence of evidentiary support for the 1989 order. The *assumed* "factual" predicate for the 1989 order is that Dr. Glasser used *still-protected* data from the Closed Files in his work at MCC, or that he surely will use such data *in futuro* because "he cannot forget that which he learned as a result of being a court expert".[48] The adjective "assumed" warrants emphasis, because there were neither findings by the court, nor facts in evidence, that Dr. Glasser actually had used, or intended to use, *still-protected* data. Instead, the 1989 order rests solely on the "naked speculation" of Robins' counsel with which the court happened to "fin[d] itself in agreement"—and which does *not* suffice to establish "good cause" under FRCP 26(c).[49] Indeed, because "[t]he court made neither factual findings nor legal arguments supporting the need for this sweeping restraint order", "imposition of the order was an abuse of discretion".[50]

D. Other factors proving that the 1989 order lacked "good cause". Consideration of six other typical factors[51] makes apparent the absence of "good cause" for the 1989 order.

1. The public nature of the information. The information Dr. Glasser is prohibited from disseminating is not properly subject to a protective order at all: namely,

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[48] Pet. App. at 15a. That the District Court was referring only to *still-protected* data is clear from its rationalization of the muzzling of Dr. Glasser: "It is simply impermissible for Glasser • • • to use protected infromation, when other claimants • • • *are forbidden access* to it." *Id.* at 14a-15a (emphasis supplied).

The court did not even identify, let alone establish, the assumed "legal" predicate for the 1989 order: *i.e.*, precisely how it could legitimately punish Dr. Glasser for use of data from the Closed Files that was already *public*.

[49] *Compare ante*, page 8, *with In re* Halkin, 598 F.2d at 193, *and* Gulf Oil Co. v. Bernard, 452 U.S. 89, 103 n.18 (1981).

[50] Gulf Oil Co., 452 U.S. at 103. *See id.* at 101-02. That *Gulf Oil Co.* arose under FRCP 23 is not relevant, as the Court cited as authority *In re Halkin*, decided under FRCP 26(c). 452 U.S. at 102 n.16.

[51] *E.g., In re* Alexander Grant & Co. Litigation, 820 F.2d 352, 355-56 (11th Cir. 1987).

- information derived from knowledge, training, and experience Dr. Glasser had *prior* to his activities as an expert, or that he obtained *thereafter* and *independently of* access to the Closed Files;[52] and

- information in the form of statistical aggregates that derived from data in the Closed File but was *publicized in open court*.[53]

2. The unlikelihood of the claimed harm. The 1989 order addresses only the *imaginary* harm that Dr. Glasser may use "protected information, when other claimants * * * are forbidden access to it".[54] Morever, Robins (the real moving party in this matter[55]) never identified a "clearly defined and very serious injury" it faced,[56] never made "a specific * * * showing * * * of the particular abuses" it alleged,[57] and never proved that "dissemination of the discovery materials would pose a concrete threat to an important countervailing interest".[58] Instead, relieved of the burden of supporting its motion with evidence, Robins' counsel simply advanced *claims* about the future, which the District Court obligingly accepted.[59] "An order restraining speech cannot be based on a record that reveals only naked spec-

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[52] *E.g.*, International Products Corp. v. Koons, 325 F.2d 403, 407-09 (2d Cir. 1963).

[53] *E.g.*, Craig v. Harney, 331 U.S. 367, 374 (1947) ("What transpires in the court room is public property."). *Accord, e.g.*, Wilson v. American Motors Co., 759 F.2d 1568, 1571 (11th Cir. 1985); In the matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1312-13 (7th Cir. 1984).

[54] *Ante*, note 48.

[55] "Although Robins' motion is not at present properly before the [District] Court, the Court finds itself in agreement with Robins' contention." Pet. App. at 14a.

[56] United States v. IBM, 67 F.R.D. 40, 46 (S.D.N.Y. 1975) (emphasis deleted).

[57] Coles v. Marsh, 560 F.2d 186, 189 (3d Cir. 1977).

[58] *In re* Halkin, 598 F.2d at 193 (footnote omitted).

[59] *Ante*, page 8.

ulation", however; and "a determination of the likelihood of future harm from as yet unuttered speech will necessarily be speculative".[60]

3. The imprecision of the 1989 order. The 1989 order evidences the type of overbreadth traditionally condemned as an unconstitutional prior restraint.[61] Revealingly, although the order restrains Dr. Glasser's expression of professional views on the Dalkon Shield, the District Court

> made no assessment of the strength of [Robins'] continuing interest, the need for such a broad restriction, or the availability of alternative measures. In the absence of these findings, [Dr. Glasser's] right to be free of the restriction is clear and indisputable.
>
> * * * In this case, the * * * court's issuance of an overbroad restraint without any findings or particularized showing whatsoever is "so 'egregiously erroneous' that the action could be deemed a 'usurpation of power.' "[62]

4. The perdurance of the 1989 order. By permanently prohibiting Dr. Glasser's "representation, in any manner or capacity", of Dalkon-Shield victims, the 1989 order constitutes a temporally unlimited restraint on speech.

5. The availability of less-onerous alternatives. The District Court never considered whether restraints less-onerous than the 1989 order could protect Robins' legitimate

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[60] *In re* Halkin, 598 F.2d at 193 & n.42.

[61] *Compare* the court's ruling that "Glasser's continued representation, in any manner or capacity, of any interest adverse to Robins or the Trust will constitute a violation of the protective orders", Pet. App. at 15a, *with* Organization for a Better Austin v. Keefe, 403 U.S. 415, 418-20 (1971)(vacating injunction against distribution of literature "of any kind"). This matter is fully briefed in Part II of the Argument, *post*.

[62] *In re* Halkin, 598 F.2d at 198-99 (footnote omitted).

interests in the confidentiality of the still-unpublicized data from the Closed Files.[63]

6. The interests of the public. The "public" with the interests of which the District Court should have concerned itself includes the thousands of Dalkon-Shield victims whom MCC's services could benefit. The court disregarded these interests, except to bemoan the fate of victims subject to "absolutely incompetent" representation, even while forbidding Dr. Glasser to aid them.[64]

E. The compelling precedential authority of *National Polymer Products, Inc.* v. *Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981). The Court of Appeals ignored *National Polymer*, although the latter is a factual-*cum*-legal template against which the invalidity of the District Court's 1989 order can be measured. In that case, with the consent of National Polymer's vice-president, Rodenbaugh, the trial court promulgated a protective order banning disclosure of all information produced by Borg-Warner. After testimony in a public trial disclosed the protected information, Rodenbaugh set up the "National Polymer Institute" to educate members of the industry about the issues involved in the litigation. The trial court enjoined him, holding that "release of information gained in discovery * * * would constitute a violation of [the protective] order, despite the fact that some of this information was revealed in testimony in open court".[65]

The court of appeals reversed. The court asked "whether, notwithstanding that the public enjoys th[e] right [to publish information presented in open trial]", Rodenbaugh "may nevertheless be prohibited from exercising the same right". Holding "the mere status of [Rodenbaugh's]

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[63] *E.g.*, the court could have interpreted the original protective orders to prohibit Dr. Glasser from using data from the Closed Files that had not been disclosed in open court. Of course, Dr. Glasser denied that he was using such data; and Robins never even attempted to prove the contrary.

[64] *See* Pet. App. at 42a.

[65] 641 F.2d at 420-21.

involvement in a lawsuit * * * insufficient to justify the restriction", the court then asked "whether, by agreeing to * * * the protective order", Rodenbaugh "waived his right to disclose discovery information later revealed at trial".[66] Explaining that "[a] waiver of First Amendment rights may only be made by a 'clear and convincing' relinquishment", the court then observed that

- "the order * * * is not unambigous";
- Rodenbaugh "disputes that the order was intended to extend to information disclosed at trial";
- "[t]he trial court apparently credited Mr. Rodenbaugh's contention that he acted in good faith belief that the order was not so drawn, since it refused to adjudge him in contempt";
- Rodenbaugh's "reading of the order is not unreasonable"; and
- the "order could have been drawn expressly to require the submission of confidential information to the trier of fact under seal".

The court then held that any "waiver must be narrowly construed", noted that "enforcement [of a protective order] against a party disputing its scope * * * cannot be upheld without supporting findings", and remanded for a determination of whether the injunction could overcome "the heavy presumption against th[e] constitutional validity [of prior restraints]".[67]

Obviously, the parallel between Dr. Glasser's situation and *National Polymer* is as uncanny as the Court of Appeals' refusal to follow, or even to acknowledge, that decision is unfathomable.[68]

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[66] *Id.* at 421, 423.

[67] *Id.* at 423-24.

[68] The parallel extends even to the repeated statements of the District Court that Dr. Glasser had acted in good faith. Pet. App. at 17a, 19a, 25a, 40a, 42a.

II. The District Court's order of 19 July 1989 is a prior restraint repugnant to the First Amendment.

Because the 1989 order flies in the face of the *Seattle Times Co.* standards, it is a *prior restraint*, "the most serious and least tolerable infringement on First Amendment rights".[69]

A. A "prior restraint" is a "predetermined * * * prohibition restraining specified expression".[70] It places specific communications under the personal censorship of a judge.[71] And its purpose is suppression of communication, rather than punishment.[72] Against this definitional background, the 1989 order is a classic prior restraint: For it concentrates an indefinite range of communications by Dr. Glasser under the personal censorship of a judge, and the threat of contempt, perpetually.

B. As a prior restraint, the 1989 order falls under a "heavy presumption" of unconstitutionality.[73] Indeed, it could be justified only if the expression it outlaws "surely will result in direct, immediate, and irreparable damage", or "must inevitably, directly, and immediately cause the occurrence of an event kindred to imperilling the safety of a transport already at sea".[74] Such is not the case here.

C. The 1989 order cannot escape this fatal presumption simply because its origin is judicial: "[T]he interest of the

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[69] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

[70] Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975).

[71] *See* Kalven, "Foreword: Even When a Nation is at War", 85 *Harv. L. Rev.* 3, 33 (1971).

[72] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975); Near v. Minnesota, 283 U.S. 697, 715 (1931). Of course, "[p]unishment by contempt is an important attribute of a 'prior restraint' ". Chicago Council of Lawyers, 522 F.2d at 248.

[73] Southeastern Promotions, Ltd., 420 U.S. at 558. *Accord, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[74] New York Times Co., 403 U.S. at 730 (Stewart, J., concurring), 726-27 (Brennan, J., concurring).

judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment."[75] Neither does FRCP 26(c), as a specific aspect of the administration of justice, create an exception.[76] Indeed, the Rules Enabling Act explicitly provides that the Federal Rules "shall not abridge, enlarge or modify any substantive right".[77]

Nor can the District Court's jeremiads against possible "abuses" override these constitutional strictures.[78] *First*, mere perjorative epithets cannot excise this case from the ken of the First Amendment.[79] Rather, "the hypothesis that abuses occur * * * must be examined with the same scrutiny as other factual hypotheses".[80] *Second*, the supposed "abuses" are imaginary: *(1)* Dr. Glasser revealed *no* "personal details" of individual Dalkon-Shield cases; and no one has claimed otherwise.[81] *(2)* Dr. Glasser's knowledge of statistical aggregates from historic data in the Closed Files that was publicized in open court is *not* unique.[82] *(3)* MCC's so-called "solicitation" of clients is entitled to First-

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[75] Rodgers v. United States Steel Corp., 508 F.2d 152, 163 (3d Cir. 1975).

[76] *See In re* Halkin, 598 F.2d at 187.

[77] 28 U.S.C. § 2072, ¶ 2.

[78] The court referred to four possible "abuses": *viz.*, (i) "reveal[ing] personal details of the cases of individual [Dalkon-Shield] claimants" in the Closed Files; (ii) knowing "the exact dollar amounts of judgments and settlements received by individual claimants prior to the filing of Robins' petition"; (iii) "solicitation" of Dalkon-Shield claimants as clients; and (iv) "paid officers of the court offering themselves as experts". Pet. App. at 13a, 14a, 18a, 41a.

[79] *See* City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976). *Accord*, NAACP v. Button, 371 U.S. 415,429 (1963), *followed in* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Riley v. National Fed'n of the Blind, ___ U.S. ___, ___, 108 S. Ct. 2667, 2677 (1988).

[80] Bernard v. Gulf Oil Co., 619 F.2d 459, 475 (5th Cir. 1980), *aff'd on nonconstitutional grounds*, 452 U.S. 89 (1981).

[81] Pet. App. at 24a, 27a-28a, 39a.

[82] *Ante*, note 48.

Amendment protection, whether treated as such,[83] as "advertising" by a law firm,[84] or simply as "commercial speech".[85] And *(4)* the Court of Appeals itself has explicitly sanctioned "paid officers of the [District C]ourt offering themselves as experts" in the Dalkon-Shield matter![86]

D. The 1989 order is fatally overbroad. It "suppresses essentially everything" Dr. Glasser might do professionally in the Dalkon-Shield area.[87]

E. Finally, the 1989 order ignores the compelling First-Amendment interests of Dalkon-Shield *victims*.

> Freedom of speech presupposes a willing speaker. But where the speaker exists, as is the case here, the protection afforded is to the communication, to its source, *and to its recipients both.* * * * If there is a right to advertise, *there is a reciprocal right to receive the advertising, and it may be asserted by th[e speaker]*.[88]

The District Court waxed sorrowful over the plight of the Dalkon-Shield victims whom Dr. Glasser founded MCC to aid—but, by outlawing communications between those vic-

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[83] *See* NAACP v. Button, 371 U.S. 415, 428-29 (1963), *followed in In re* Primus, 436 U.S. 412 (1978); United Transportation Union v. State Bar, 401 U.S. 576 (1971); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964). *See also* Rodgers, 508 F.2d at 163-64 (court may not suppress speech under guise of enforcing a nonexistent federal common-law offense of "barratry").

[84] Bates v. State Bar of Arizona, 433 U.S. 350, 366-84 (1977).

[85] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-73 (1976).

[86] Official Dalkon Shield Claimants' Committee v. Mabey, 880 F.2d 769, 778 (4th Cir. 1989)(for Trust "to employ the Clerk of the Bankruptcy Court at a salary of $150,000 per year" is permissible, where prior experience made "this man * * * the best qualified to assist the Trustees").

[87] *Compare* Bernard, 619 F.2d at 476-77, *with* page 13, *ante*.

[88] Virginia State Bd. of Pharmacy, 425 U.S. at 756-57 (footnote omitted) (emphasis supplied).

tims and Dr. Glasser, it relegated many of them to seeking out the very "people who are offering to help" who the court "know[s] from [its] own experience" "are absolutely incompetent".[89]

In sum, the 1989 order is a prior restraint repugnant on its face to the First Amendment.

CONCLUSION

Dr. Glasser does *not* seek either to invalidate any of the District Court's first three protective orders, or to avoid the proscriptions of those orders *as they should rightly be construed*. He does, however, ask that this Court vacate the 1989 order. For that order is a Frankenstein's monster of illegalities cobbled one with another into a truly repellant creation: It lacks any semblance of "good cause" under FRCP 26(c). And it constitutes a classic prior restraint, offensive to the First Amendment.

For these reasons, this Court should grant the petition and issue a writ of certiorari.

Respectfully submitted,

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(703) 791-6780

Attorney for Jay H. Glasser

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[89] Pet. App. at 42a.

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1061

JAY H. GLASSER,
Claimant-Appellant,

v.

A. H. ROBINS COMPANY, INCORPORATED,
Debtor-Appellee,

DALKIN SHIELD CLAIMANTS TRUST,
Intervenor.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (CA-85-1307-R)

Argued: January 9, 1991

Decided: November 15, 1991

Before RUSSELL and WIDENER, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Affirmed by published opinion. Judge Widener wrote the opinion, in which Judge Russell and Senior Judge Chapman joined.

COUNSEL

ARGUED: Edwin Vieira, Jr., Independent Hill, Virginia, for Appellant. Orran Lee Brown, Sr., CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL, Richmond, Virginia, for Appellee. **ON BRIEF:** John [2] E. Lawson, Jr., Ralph

V. Eickhoff, Jr., LAWSON & EICKHOFF, Fairfax, Virginia, for Appellant. Michael W. Smith, CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL, Richmond, Virginia; Linda J. Thomason, MAYS & VALENTINE, Richmond, Virginia, for Appellee.

OPINION

WIDENER, Circuit Judge:

Jay Howard Glasser appeals the district court's denial of his motion to be released from certain protective orders of the court. We find no error and affirm.

This case is ancillary to and is another chapter in the Dalkon Shield litigation involving A.H. Robins. In March 1986, the district court appointed Professor Francis McGovern as an expert to advise the court on the estimation of Dalkon Shield Claims. In this capacity, McGovern had access to several thousand files from Dalkon Shield claims and suits that were resolved prior to the Chapter 11 filing of A.H. Robins (Closed Files). Some of these files were subject to individual confidentiality agreements. To ensure the confidentiality of the files, the district court entered its first protective order concerning these files on July 10, 1986. The order provided that "any person authorized . . . to examine the contents of the [the Closed Files] shall not disclose their contents, in part or in full, to any person not expressly authorized to such access by this or subsequent order of this Court." The court entered two other orders with similar restrictions on September 18, 1986, and June 26, 1987.

The Committee of Dalkon Shield Claimants, the official representative of the interests of Dalkon Shield claimants in the Chapter 11 case, filed an application for authorization to employ Glasser as an expert to assist it in analyzing and evaluating Dalkon Shield claims. In its proposed budget, the committee stated that one of Glasser's duties would be to "[s]tudy 'representative' closed claims folders

to determine available data and coding problems . . . ." The court authorized the claimant's committee to employ Glasser *nunc pro tunc* to [3] June 12, 1986. Glasser then reviewed pending and settled claims including those in the Closed Files. As of July 12, 1988, Glasser had billed a total of $307,156.25 for professional fees for evaluating Dalkon Shield claims commencing with August 21, 1985.

On January 9, 1989, Medical Claims Consultants, Inc. (MCC), was issued a certificate of incorporation by the Commonwealth of Virginia. Glasser is one of the principal officers of MCC. MCC advertises itself to be comprised of "specialists in Dalkon Shield claims analysis."*

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* In his letter to the Director of the Claims Resolution Facility, John E. Lawson described Medical Claims Consultants as follows:

> As a result of our analysis, we organized MEDICAL CLAIMS CONSULTANTS (MCC) to assist Dalkon Shield Claimants with their claims. The principal officers of MCC have extensive contacts within the health care and legal community and are uniquely qualified to serve as Agents for Dalkon Shield Claimants. Jay H. Glasser, PhD, worked for over one and one-half years as a Court appointed health and statistics expert to analyze Dalkon Shield claims. As part of his work he led an analytic team that linked previously settled claims information to estimate current claims values. His work on the Dalkon Shield concentrated on Claimants surveys, the classification of injuries and alternative causation. . . .
>
> • • • •
>
> MCC was organized to provide the basic services that I described earlier in this letter, drawing upon the expertise of a variety of medical health care, legal and other professionals (e.g., physicians, nurses, health statisticians, epidemioligist, attorneys, and economists) to evaluate and document individual claims. Its strength lies in the fact that it brings together a broad range of technical expertise essential for identifying, establishing and documenting medical claims.

On June 22, 1989, A.H. Robins Co. filed a motion requesting that the court enter an order requiring Glasser to show cause why he should not be held in contempt of court for violating the court's protective orders through his participation in MCC. The next day, Glasser requested that he be released from the court's protective orders. A.H. Robins then requested that its show cause motion be held [4] in abeyance pending the district court's decision on Glasser's request. The court granted Robins' motion to hold the contempt proceeding in abeyance.

After a hearing on Glasser's motion to be relieved from the protective orders, the district court denied his motion. The court found that

> the Closed Files contained information concerning the exact dollar amounts of judgments and settlements received by individual claimants prior to the filing of Robins' petition. It is exactly this data which was of crucial importance in reaching a valid estimation of Robins' total Dalkon Shield-related liability. The Court perceived that possession of this information, however, would also be very useful to anyone representing Dalkon Shield claimants in negotiations with or litigation against the Trust. Knowing the historical values placed upon particular types of injuries resulting from use of the Dalkon Shield would give a claimant a "leg up" on others in making demand for compensation upon the Trust.
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> * * * *
>
> In representing Dalkon Shield claimants and advising them as to the value of their claims, Glasser has necessarily utilized information gleaned from the Closed Files, even if he has not directly disclosed the data underlying his recommendations. It is simply impermissible for Glasser and his clients to use protected information, when

other claimants and their representatives are forbidden access to it.

On appeal Glasser argues that the district court's protective orders do not encompass Glasser's activities at MCC and if the protective orders do restrain Glasser's activities at MCC, the orders are violative of the First and Fifth Amendments to the United States Constitution.

The district court made a factual finding that "Glasser has necessarily utilized information gleaned from the Closed Files, even if he has not directly disclosed the data underlying his recommendations." The district court was not clearly erroneous in making that finding. In a [5] letter to the Director of the Claims Resolution Facility of the Dalkon Shield Claimants Trust, Glasser's associate at MCC, John E. Lawson, Jr., stated ". . . I subsequently purchased a list of names and addresses in order to test an idea that a friend of mine at the University of Texas (Dr. Jay Glasser) and I had developed *as a result of his observations as a Court-appointed expert* working with Dr. Francis McGovern in the bankruptcy litigation which led to the creation of the Trust." Letter dated December 28, 1988, from John E. Lawson, Jr. to Dr. Michael H. Sheppard (emphasis added). Faced with this statement by Glasser's associate at MCC, we are of opinion that the district court's factual findings are not clearly erroneous. Therefore, we find no merit in Glasser's assertion that the protective order does not apply to his activities at MCC.

Glasser next contends that the protective orders violate the First and Fifth Amendments by limiting his freedom of speech and freedom to contract. The reasoning of the Supreme Court in *Seattle Times Co. v. Rinehart*, 467 U.S. 20 (1984) leads to a determination that the First Amendment is not offended by the protective orders at issue in this case. In *Seattle Times*, the Court held that when "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the contents of pretrial

civil discover, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." 467 U.S. at 37. While that case involved the use of protected information by a litigant, we see no reason why the rule would not be equally applicable to a court-appointed expert. the facts in the instant case are even more compelling for upholding the order. The initial protective order was entered before Glasser was appointed as an expert and Glasser was a willing participant in the project. In addition, Glasser was handsomely compensated for performing as a court-appointed expert.

We find no merit to Glasser's claims that his Fifth Amendment rights were violated by the protective order. We are aware of no authority for the proposition that a highly paid court-appointed expert with access to confidential information may later use his position and knowledge gained from that experience in representing individuals involved in the same matter. Glasser seeks an order allowing him to profit from confidential information obtained as a court-appointed [**6**] expert. That will not do.

The order of the district court appealed from is accordingly

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1061

JAY H. GLASSER,
Claimant - Appellant,

versus

A. H. ROBINS COMPANY, INCORPORATED,
Debtor - Appellee,

DALKON SHIELD CLAIMANTS TRUST,
Intervenor.

FILED

JAN 8 1992

U.S. Court of Appeals
Fourth Circuit

ORDER

There having been no request for a pool of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Russell and Judge Chapman.

/s/ H. E. Widener, Jr.
For the Court

A True Copy: Teste:

John M. Greacen, Clerk

By Cheryl Williamson
Deputy Clerk

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA

Richmond Division

Chapter 11

Case No. 85-01307-R

Retained Proceeding
(Judge Merhige)

In re

A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

ORDER

For the reasons expressed in the Memorandum Opinion issued this same day, it is hereby

ORDERED that the motion of Jay H. Glasser seeking to be relieved from the provisions of this Court's protective orders be, and is hereby, DENIED.

The Clerk is directed to forward a copy of this Memorandum Opinion and Order to Jay H. Glasser, Linda J. Thomason, Esq., and to the persons on the attached list.

ENTER:

Robert R. Merhige, Jr.
United States District Judge

July 19, 1989
Richmond, Virginia

NOTICE OF JUDGMENT OR ORDER
Entered on Docket JUL 19 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA

Richmond Division

Chapter 11

Case No. 85-01307-R

Retained Proceeding
(Judge Merhige)

In re

A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

MEMORANDUM OPINION

This matter comes before the Court upon the motion of Jay H. Glasser ("Glasser") seeking to be relieved from the provisions of protective orders earlier entered by the Court. Finding it appropriate so to do, the Court will deny Glasser's request, and will authorize the debtor to revive its previously abated show cause motion if it perceives continued violation of this Court's orders.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Glasser's motion arises in somewhat unusual procedural circumstances. Originally, counsel for the debtor brought before the Court a request for an order directing Glasser to show cause why he should not be held in contempt for violating certain protective orders entered by the Court respectively on July 10, 1986, September 18, 1986 and June 26, 1987. These orders, which will be more fully discussed below, pertained to the [2] confidentiality re-

quirements surrounding certain Dalkon Shield files of A.H. Robins Company, Inc. ("Robins"), Robins' insurer, Aetna Casualty & Surety Company, Inc., and their respective counsel.

In its motion for a show cause order, Robins asserted that Glasser has violated, and continues to violate the protective orders by carrying on a business venture, the purpose of which is to advise Dalkon Shield claimants in asserting their claims against the trust set up to provide redress for these inured by the Shield. More specifically, Robins contended that Glasser has used information concerning the historical value of Dalkon Shield claims—that is, information about prepetition settlement or judgment values of various types of Shield-related injuries—to create a statistical model which will be used by Glasser's business to recommend particular injury valuations to individual Dalkon Shield claimants. These recommendations will be used in the claimants' negotiations with or litigation against the Dalkon Shield Claimants Trust ("the Trust"), which was created as part of Robins' Chapter 11 plan of reorganization.

Responding to Robins' request for a show cause order, Glasser filed with the Court a motion petitioning for relief from the Court's protective orders. Subsequently, Robins sought an order holding its show cause motion in abeyance pending the outcome of Glasser's request for relief. The Court granted Robins' request, and a hearing on Glasser's motion for relief was conducted on July 14, 1989.

[3] Robins filed a voluntary petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. §101 et seq.) on August 21, 1985. For purposes of formulating a plan of reorganization which could be approved by this Court, it was necessary to undertake an estimation of the value of several hundred thousand contingent and unliquidated tort liability claims against Robins arising from Robins' manufacture and sale of the Dalkon Shield intrauterine device. As part

of this estimation process, the Court, by order dated March 21, 1986, appointed Professor Francis McGovern ("McGovern") as an expert.

As the Court's expert, McGovern had access to several thousand files from Dalkon Shield claims and suits that were resolved prior to the commencement of this case ("the Closed Files"). The Court found that McGovern's access to these files was "compelled by the overriding federal interest in facilitating a fair and expeditious resolution of these Chapter 11 proceedings." Order, entered July 10, 1986, ("First Protective Order") p.2.

Recognizing that the information contained in the Closed Files had to be kept in the strictest confidence, both to protect the privacy of individual claimants and to prevent abuse in future claims or suits brought against Robins or its successor, the Court ordered that McGovern, and the other experts, such as Glasser, retained by him could "not disclose [the Closed Files'] contents, in part or in full, to any person not expressly authorized to such access by this or subsequent order of this Court" First Protective Order, p. 3.

[4] On June 12, 1986, Glasser was appointed as an expert to assist McGovern in the estimation process. Glasser's several fee applications reveal that during the period of his employment he spent some time reviewing information from the Closed Files. In the summer of 1986, around the time of Glasser's appointment, the McGovern experts requested, and received, access to a greater number of Closed Files. As part of granting this increased access, the Court entered a second, superseding protective order ("the Second Protective Order") on September 18, 1986.

This Second Protective Order again provided that "any person authorized. . .to examine the contents of Dalkon Shield case files shall not disclose their contents, in part or in full, to any person not expressly authorized to such

access by. . .order of this Court." Second Protective Order, p. 3.

Finally, on June 26, 1987, the Court entered a third, more extensive protective order ("the Third Protective Order") which provides, in pertinent part, as follows:

> Deeming it proper so to do, it is adjudged and ordered that any and all material submitted or otherwise obtained by Professor McGovern and/or other experts retained by Professor McGovern and authorized by the Court for the purpose of evaluating and sampling Dalkon Shield claims shall be deemed to be matters of the strictest confidentiality . . .
>
> . . .
>
> The information received from Professor McGovern pursuant to this Order shall not, under penalty of contempt, be disclosed in any manner whatsoever to any persons other than the experts of the respective parties, counsel for the Debtor, the official committees and such other parties deemed necessary by counsel to fulfill their obligations to their respective [5] client [sic] and the Court.

Third Protective Order, p. 2.

Taken together these protective orders evince the intent of the Court, as well as the parties in interest in the Robins' bankruptcy, to safeguard the information contained in the Closed Files. As stated above, a controlled disclosure of that information to the Court's experts, and to the Debtor and official committees, was integral to the important estimation process. The Court was aware, however, of the potential for abuse of the data contained in the Closed Files.

First, the Closed Files comprised documents which revealed personal details of the cases of individual claimants.

As such, these claimants' significant privacy interests were at stake.

Second, and more important, the Closed Files contained information concerning the exact dollar amounts of judgments and settlements received by individual claimants prior to the filing of Robins' petition. It is exactly this data which was of crucial importance in reaching a valid estimation of Robins' total Dalkon Shield-related liability. The Court perceived that possession of this information, however, would also be very useful to anyone representing Dalkon Shield claimants in negotiations with or litigation against the Trust. Knowing the historical values placed upon particular types of injuries resulting from use of the Dalkon Shield would give a claimant a "leg up" on others in making demand for compensation upon the Trust.

In its abated show cause motion, Robins alleged that Glasser [6] was making just this sort of use of Closed File data. Robins asserted that Glasser has become a principal in a corporation called "Medical Claims Consultants, Inc. ("MCC")," and that in his capacity with the entity he has used information acquired as a Court expert to analyze and evaluate the Dalkon Shield claims of individual clients of MCC. Specifically, Robins claimed that Glasser has created a statistical model for evaluating Dalkon Shield claims based in part upon information protected by the Court's orders. Use of this model alone, without any direct disclosure of protected information, Robins contended, violates the protective orders.

Although Robins' motion is not at present properly before the Court, the Court finds itself in agreement with Robins' contention. In representing Dalkon Shield claimants and advising them as to the value of their claims, Glasser has necessarily utilized information gleaned from the Closed Files, even if he has not directly disclosed the data underlying his recommendations. It is simply impermissible for Glasser and his clients to use protected in-

formation, when other claimants and their representatives are forbidden access to it.

The Court wishes to emphasize that it cannot find that Glasser in any way intended to violate the Court's protective orders when he become associated with MCC, and began advising individual Dalkon Shield claimants. Glasser's intentions, however, are irrelevant. His conduct constitutes a clear violation of both the letter and the spirit of the protective orders, and he must desist in using [7] Closed File data to represent claimants.

At the hearing on Glasser's motion, Glasser suggested that to purge himself of any violation of the protective orders he would be willing to surrender the statistical model he developed to evaluate Dalkon Shield claims. The Court believes that this suggestion is inadequate. Even if Glasser's computer model were destroyed, and all Closed File records returned, Glasser's knowledge would remain. He cannot forget that which he learned as a result of being a Court expert involved in the estimation process.

The Court concludes that the danger for misuse of the information contained in the Closed Files persists, and for that reason will not permit Glasser, or any other party privy to those files, to be relieved of the provisions of the protective orders. Futhermore, although Robins' show cause motion is not presently before it, the Court believes that Glasser's continued representation, in any manner or capacity, of any interest adverse to Robins or the Trust will constitute a violation of the protective orders. As such, the Court will authorize Robins to revive its motion if it perceives continued violation of those orders.

ENTER:

Robert R. Merhige, Jr.
United States District Judge

July 19, 1989
Richmond, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE: A. H. ROBINS, DEBTOR

CHAPTER 11

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge
HONORABLE BLACKWELL N. SHELLEY,
United States Bankruptcy Judge

July 14, 1989
Richmond, Virginia

JAY H. GLASSER'S MOTION FOR RELIEF FROM STAY

[2] THE CLERK: Bankruptcy action 85 01307 R.. In re: A. H. Robins Company, Inc.

Appearing on motion by J. H. Glasser for relief from protective order.

All persons who wish to be heard today, please state your name and appearances for the record just prior to commencing to speak.

THE COURT: Good morning. I am sorry for the delay, but we have been tied up.

MS THOMASON: May it please the court, I am Linda Thomason on behalf of A. H. Robins here today. This is a little out of the ordinary. We are here today on Dr. Glasser's motion. Although he is present in the courtroom, he is without counsel. I also understand that present in the courtroom is Mr. Jack Lawson, who is involved in a Medical Claims Consultants, with the organization with which Mr. Glasser is also affiliated. He is a lawyer in

Fairfax, Virginia, but not a member of the bar of this court.

I thought I would take this opportunity at least to introduce him. He is available here to provide information to the court, and to assit you in determining Dr. Glasser's motion.

I think you probably are going to want to hear from them first, although Robins is prepared—

[3] THE COURT: We should let the record show that this was precipitated by a motion seeking a show cause order. I knew that Dr. Glasser had had something to do with the proceedings way back, as, I think, on behalf of the Court, really, through Professor McGovern. And I concluded that rather than put out an order to show cause why he shouldn't be jailed, punished, or otherwise jailed, confined, or what have you, that we would do it another way. And I contacted Dr. Glasser, who in the meantime had written saying that he had, or did write and said he had not violated the protective order. And I guess I was the one who told him, well, until he was relieved from it, he had to—there couldn't be any question. And he made the motion. And that is the way it is. It is a very, very serious matter.

I don't like to prejudge things, but I am going to start with the assumption, and I think a fair one, that if Dr. Glasser has done anything he should not have done, it was not intentional. But I am not going to have—I can tell you right now before we start, any information that anybody got when they worked for this court is under a protective order, and it will not be used in any manner whatsoever, period.

I guess that is A. H. Robins' attitude.

MS THOMASON: Correct.

THE COURT: I am more disturbed than ever of Mr. [4] Glasser's situation, Dr. Glasser's situation. I want to hear

from him, of course. I received a communication recently that borders on what I think, I think Judge Shelley agrees with me—I am sure it is innocent—borders on solicitation, which used to be a criminal offense in Virginia. He says in these papers, as I read them, charging people for somekind of advice. And then says, if they negotiate, then we ought to do something about that plan, if we can. We ought to have people coming in negotiating. Unless they are lawyers—I think it is wrong, we may be stuck with it—we are going to start charging people 25 percent when the trust is duty bound to pay a fair and highest amount that they can. And then there is a suggestion that if it gets to counsel, that Dr. Glasser has counsel who is available to do it.

Now, that is solicitation. And I want to hear from him. You didn't have trouble until you responded. Now you have trouble.

MS THOMASON: Robins shares the Court's concerns, and I think Mr. Glasser is here today and prepared to address some of these. We would ask that to the extent that he is going to testify today, that he be sworn and be available to answer the Court's questions.

THE COURT: Of course. Of course.

MS THOMASON: Thank you, Your Honor.

[5] THE COURT: Do you wish to testify, Dr. Glasser? I think probably it would be the better way to do it.

DR. GLASSER: Yes, yes.

THE COURT: All right. Come around and be sworn.

And if you are more comfortable from the lectern, I will let you do it from there until cross examination, and then you have to take the witness stand.

JAY H. GLASSER
WAS SWORN AND TESTIFIED AS FOLLOWS:

THE COURT: You are Dr. Jay Glasser; is that correct?

A. Yes. Glasser.

THE COURT: Glasser. You were one of the people who was subject to the Court's several protective orders; is that correct?

A. Yes.

THE COURT: Because you acted as an expert assisting, I believe, Professor McGovern, or, no, it was the claimants' committee.

A. We were—I was nominated by the claimants' committee, but worked with the group with Professor McGovern.

THE COURT: All right. Well, now, you know what the allegation is, that you set up some sort of a business, and [6] that there has been a violation of the protective order. I think it is very dangerous that you do anything at all, frankly, in light of the knowledge that you are bound to have gained while working with the McGovern group. And I thought we had cut it off with the protective order, but perhaps we haven't. I would like to assume that you have not violated it, and if you have, then it has been inadvertent.

So you go ahead and tell us whatever you want to tell us.

A. All right. I would like to immediately affirm that, you know, I recognize the seriousness of the charges and that also I have not violated the protective order in the past, nor ever would contemplate doing so in the future. I did file a memorandum to the court, and I would like to just summarize that and, of course, answer questions as they arise.

Basically what I have said is that in the opening paragraph is that in fact I did not violate the order and really all I had to ask for is the continued participation in Medical Claims Consultants, which I thought was or is a fairly straight forward and useful service.

All of the data has been carefully preserved, and confidentiality of the data that is covered under the protective order. And as I mentioned, and as I think you [7] had said in our opening remarks, that circumstances in which I filed the petition to be released—and I certainly want to say that I hope there will be a resolution of this—I would like to just summarize some of the major points that I have made. I have not set out, incidentally, to test the court or to request any special favors. I wish to be treated no differently, obviously, than any other expert or person who may have seen or used the data. And in entering into the medical claims consultancy, thinking of it as a useful service, I had made every effort to let people know that in fact I was entering into M. C. C. so it would be a public and open process. And in that I drew upon, really, the Medical Claims Consultants. And I would like to talk about the activities of the Medical Claim Consultants.

THE COURT: May I ask you, though, is it possible to engage in any of this without uitlizing information that you gained during your service as an expert for the court?

A. I think, you know, trying to answer that, I—the data that are really used is that that only came out in the public hearing, so that the data are to the extent that it has been used or is useful, is only that which is, I would say—I don't want to use the word "public domain," but has been heard publicly and viewed publicly. The experience, I think, in that sense, I can't deny, obviously is within me, and is something that I have.

[8] But then there again it was difficult for me to separate out what was prior experience that in fact led me to be nominated for, and later accepted as an expert.

What I would also like to demonstrate is that the services of M. C. C. in fact are, as I mentioned before, both straight forward and fairly direct, and involve primarily helping the claimants who put her claim forth to fully

describe her claim, injuries, and circumstances. And to that end we have developed a short form questionaire that is totally of our own design, so that she can, as I said, fully talk about circumstances, events, in a kind of scientific, unbiased fashion.

And then, secondly, we offered to assist in helping gathering the documents that would be needed to substantiate the claim, because clearly Medical Claims Consultants and I feel that the trust will be fair. That is that it is set up to do, that is the whole rational and history of it. And it really—the settlement of a claim will come down primarily to the quality and quantum of the kind of evidence that there is to substantiate the claim.

And so in terms of our effort to represent the claimant, we have, I feel, and I certainly hope, have stayed strictly within the claims resolution facility. And among the reasons for setting up M. C. C., I may say, is that the way we have done this is that we have not tried to screen [9] clients, we have been—we have said we would be available to help anyone who came to seek our help. We do see ourselves as an alternative, and one of several, that are obviously available to claimants between representing themselves before the trust, or hiring an attorney or any other agent.

And in fact, that is how we tried to graduate—our efforts would be be proportional to where the claim was settled. If many claims, as I am sure, are settled at option two, that could be very expeditiously handled. If they went on to option three, early evaluation following the claims resolution facility, more documents would be needed.

Now, so, we have in fact tried to set up what we thought was a very practical service that would be, really relate to drawing on my expertise; and secondarily through my prior expertise in gathering records, in being able to put them together in a logical form, and to be able to connect them up to the injuries, to the other circumstances, de-

mographic, that may surround a case, and also alternative causation. That is to say, whether there are other explanatory factors that would moderate the value or the worth, or the presentation of any claim. So that all of this was fully and fairly described and in a forum that could be presented expeditiously and succinctly to the trust.

[10] And in that regard, in terms of the systems that we built up, these have all been totally in that independent of any of the data. Now, as I said before, not independent of my experience, but independent of the data. So that the large substance, I feel, in M. C. C.'s whole purpose is, as I said, a fairly straight-forward one; to help the person gather the records, present them, present them in a way that will facilitate their review. And all of this, I do want to emphasize, obviously, has to await the procedures that the trust will enunciate, namely what they will do for option two and option three.

So in fact, the systems that we have developed, the record gathering and so on, are in a general form awaiting specific guidelines. Because in essence, that would be the crux and the nub of the advantage to a person in terms of using the service.

I did point out that as part, as the use of data in my memorandum in exhibit 1, that I had in fact modeled the claims and looked at the value quite apart from looking at any of the confidential information that was contained in the exhibit 1. I presented that because that was, came out as part of a deposition that was taken from me prior to the estimation hearing in November. And I put that in there, obviously, to demonstrate statistics and epidemiology, and the data that were available quite apart from the data [11] covered under the protective order can in fact be used to model the claims and also again point to my pre-existing experience with that.

So we tried to do several things.

One, draw upon my prior experience; two, emphasize in the work that I am doing the claims processing activities, and analytically have the system set up to await and be influenced and adopted to the option two and option three procedures that the trust will announce; and fourth, I think lastly, try to maintain an openness to our activities to show that there was nothing that we were trying to sequester. And I mean in terms of that my activities with M. C. C., and because, as I pointed out, I really felt both a professional interest in this, I mean it is a for profit company, but I also felt a professional allegiance to this.

And if I may be permitted just a few personal words, that the first and only time until this day that I was in this courtroom was during these estimation hearings in November of 1986. That I sat over there, and as you know, I presented no direct testimony, but listened throughout this time. And I just came away feeling that there, what the importance of this was to me; and also the fact that I felt I could be of some very practical assistance to people in pursuing their claims.

Many persons are sometimes confused as to what they [12] should do. They don't know whether they do have a valid case or not a valid case. They have trouble getting their medical records. They are not sure what to do. So it is that kind of commitment, really, that led me to start Medical Claims Consultants. And as I noted in my memorandum, I have tried to do this for a while as a non profit corporation to remove the notions of trying somehow or other to take advantage somehow or other of someone. That was not to be. But in any event, my commitment was strong enough to this to in fact move forward with Medical Claims Consultants. And I do believe that in everything we have done we have tried to be reputable, fair, to not make any promises, to be practical. To that end I also included in my memorandum of the articles from, for instance, in the Washington Post from Mr. Gladwell, which again I hope demonstrate that we have addressed ours to

practical issues at hand. And I may say, in my closing paragraphs, is that, again, as in my memorandum, we have affirmed that there was no confidential data that has been divulged. We don't need the confidential data to do this. And as a matter of fact, my colleagues, my colleagues in M. C. C. that would be covered by the protective order, no data has ever been divulged to anyone even within M. C. C.

I may add that parenthetically all my use of data has been statistical averages, that is my area of expertise is [13] in statistics and epidemiologic analysis, and there we go by using the group and aggregate experience. And that is essentially the kind of work that I have always done. We don't use individual records, and we have no need to. And as a matter of fact, as I mentioned in my memorandum, I am very conscious of the pitfalls of the historic data. As a matter of fact, analytically one has to be very careful for all the reasons known to the court and everybody that has worked with this as to the nature and way they were gathered, and the time difference, and the whole entire setting. And now what I look forward to, and of course the trust does, is a uniform system that fairly processes the claims, and primarily will rest upon the evidence and the substantiation that is presented with the case.

And that is where I stand today.

THE COURT: Well, you understand that the trust has its own experts assisting it in determining what they are going to do in option two, for example? What they are going to do, I don't know, but they do have their own experts.

A. Know absolutely. And I have collegues of at least the two experts that I know who have worked with this data. So, yes, I do realize that. As I said, we have put the emphasis on assisting, gathering documents and helping to fairly present that data to the trust.

THE COURT: Do you have any documents at all, [14] anything, which was generated during your service as an expert?

A. Yes.

THE COURT: Will you return those to the court?

A. Yes.

THE COURT: Professor McGovern—I am not picking on him, it may have slipped his mind, but he was asked to collect those, or have all of those documents sent to the court so that there wouldn't be any misunderstanding so we wouldn't get into any accusations such as we have here. And I would appreciate it if you would do that, Dr. Glasser.

A. Right. This was the first time, incidentally, that any of this came to my attention whatsoever. As I say, we had, starting back in as late as December told, you know, persons that had written to Mr. Sheppard at the trust, that—to tell them about M. C. C.

THE COURT: You haven't hidden anything.

A. This is the first time I have ever been asked, so I wanted to make that clear.

THE COURT: I recall your calling me a long time ago—I have forgotten the whole conversation, but I hope I didn't give you any advice, I couldn't give you any advice—but you at that time said that you were contemplating thinking of some way to assist, and I think I said, well, any assistance I think is great. But I never [15] contemplated that it would be anything that might lead to a suggestion that you would be using any of the information or data that had been accumulated during your service. So I would appreciate you forwarding whatever data that you have that was generated during that to the court.

Now, would you mind coming to the witness stand so Ms Thomason can ask whatever questions she deems appropriate.

JUDGE SHELLEY: Before she starts, let me ask you this question, Dr. Glasser.

In your memorandum, in your statement in court you say you know of pitfalls in the data that has been collected. How do you know of those pitfalls?

A. Well, as I mentioned, those are the ones that would historically be associated with retrospective data collection.

JUDGE SHELLEY: Pitfalls in other expert's models, is that what it is?

A. I am saying in the data.

THE COURT: In utilizing that data, there are some pitfalls because of—let me give you an example. Perhaps, claims that were overpaid or underpaid or something of that nature, is that what you mean?

A. Well, yes. And I heard a lawyer saying that they remembered—they weren't referring to specific cases—settling a group over a weekend, and others I had heard had [16] talked about the fact that records were lost, that they were years and years, assumed there might be a settlement, but nobody could recall exactly how or why this was. And what that was really, what I was referring to is the data itself were generated. I am looking at it from a research point of view, scientific point of view, were generated under erroneous set of circumstances that are quite different; and plus, have all of the liabilities of time when they were gathered. I might add, parenthetically, my major responsibility was not with the historic data. I primarily worked with—

JUDGE SHELLEY: Would you have known of these pitfalls but for your employment on the McGovern Committee?

A. Oh, I say they are associated with my retrospective study. The first thing you think of when you are asked, as I do professional, in professional health work, to do what are called follow back studies to individuals where you may be trying to track a disease, where it got started, how it was diagnosed, and so on. I am saying these are the—it would be in every person's first lecture on the uses of medical and epidemiologic data from retrospective studies. And, of course, here the situation I assume becomes even more complicated when these involve records that came from a variety of different sources and had rather different functions when they were gathered. There was no uniform, [17] objective, scientific way of even gathering the original documents.

CROSS-EXAMINATION.

BY MS THOMASON:

Q. Dr. Glasser, a few questions that I want to explore with you.

Specifically, your statements that you have not used any confidential information, and that you don't contemplate using that in the future. You have mentioned several times that the historical data is not of your primary concern or your main interest, but I want to explore with you whether there is any use of it whatsoever. You did in fact review what we termed "closed files" in the McGovern data in your role as an expert for the claimants' committee; is that true?

A. Not individual files.

Q. Did you review at all any information regarding the historical values of individual claims?

A. Yes, there would have been some data tapes that had individual values on them.

With no personal identifiers.

Q. Okay.

You do understand, that the, that that information was subject to the protective orders?

A. Yes.

[18] Q. Okay.

Your Medical Claims Consultants papers indicate that you attended, intend to provide numerous services to these claimants, and isn't it true that one of these is to compare the medical information they provide you to the historical values of claims, isn't that true?

A. Yes, we said we were going to profile the cases, and in that sense follow the claims resolution facility.

Q. Okay. In fact, the agency agreement that you are sending to prospective claimants states that one of the services that you are going to provide is, I am quoting from this document "epidemiological or statistical evaluation of the claimant's documented injuries to estimate the reasonable value of the claimant's claim as compared to historical claims of others injured by using the Dalkon Shield."

A. That is correct.

Q. Is that correct?

A. We assumed that that follows the language of the claims resolution facility, and so that the trust is going to provide guidelines for that as they would under options two and three.

Q. Okay. You have indicated in your presentation to the court today, and in your papers, that the large substance, I think were your words, of Medical Claims Consultant's [19] purpose is not involving this data. You have also indicated that these closed files are not very useful, they have pitfalls, but I have not heard you say that you have not used this information at all. And I would ask you again if you have reviewed the closed files and you are intending

to produce values for claimants compared to historical values, isn't it in fact true that you are using the data from the historical data which is covered by the protective order?

A. When I say using the data, in the sense that we have been using averages, but these averages were by types of injury that were produced in open court.

Q. Weren't in fact the averages produced by your review of individual historical settlement values and other values of claims?

A. Well, they do—they are generated from those, certainly.

Q. Okay.

A. Okay.

Q. And your exhibit 1 to your papers, is it correct that that was prepared prior to the release of the McGovern data, excuse me, prior to the release of the McGovern data to the parties involved, not to the general public?

A. Yes.

Q. Okay.

Your Honor, that is all the questions I have at this [**20**] point. I have several comments I would like to make to the court—

THE COURT: Yes, indeed.

MS THOMASON: —when you receive argument.

THE COURT: Anything else, Doctor?

MS THOMASON: I might ask at this time, I know Mr. Michael Sheppard is here from the trust, I don't know if he wants to ask any questions of the—

THE COURT: If he does, he will have to pass them on to you to ask.

MS THOMASON: Very well. Thank you.

Anything else?

A. Yes. I wanted to mention when we talked about statistics and epidemiology in doing the profile, again, there, we were talking about the type of data that would be needed, and the important factors that would influence a claim. So, let me give a very specific example of that.

That if someone is claiming an injury due to pelvic inflammatory disease, there would be a question of timing involved in that. So that a pelvic inflammatory disease condition that happened quite distant from the use of the Dalkon Shield would receive much less weight than one that was contemporaneus about around the time of the Dalkon Shield. So that is what we meant, and we feel are the important epidemiologic and statistic profiles that we do is [**21**] to focus on these things that are critical to establishing the claim and its severity.

As I pointed out, those are not dependent on the data from the closed claims file. As, again, I elaborated that.

My only other comment, and I may be called upon later in this hearing—I am not familiar with these kinds of proceedings—is that I really hope there would be somekind of speedy resolution to this because this is obviously, as you pointed out, Your Honor, a grave situation. It was one not of my making, and I think I am only asking to continue to participate in Medical Claims Consultants as we have embarked upon this.

And I would be glad to provide any assurances or do whatever I need to do to make sure that, assure all parties that there is no violation of the protective order, nor ever will be on my part.

THE COURT: All right, sir. Any further questions?

MS THOMASON: Your Honor, I have no further questions of Dr. Glasser. Perhaps a couple questions for Mr. Lawson.

THE COURT: Fine. Thank you sir.

(The witness stood aside)

THE COURT: Mr. Lawson, would you come around and be sworn?

[22] JACK LAWSON
WAS SWORN AND TESTIFIED AS FOLLOWS:
DIRECT EXAMINATION.

BY MS THOMASON:

Q. Mr. Lawson, I apologize for any awkwardness in this. I know this is not the way we normally proceed, but I think your testimony is important on a couple of issues.

The language I read to Dr. Glasser about the agency agreement, does that comport with your understanding of the service that Medical Claims Consultants is offering to Dalkon Shield claimants?

Specifically to compare their medical records to comparable historical values?

A. Well, my understanding on the comparable values is that it is based more on the statistical averages which came from a number of different sources, not solely those that were covered by the protective order, of which I have not seen.

Q. You say that the sources of values are from a number of different sources, including information in public. You cannot say with any certainty, can you, that that information does not include values that at least initially are derived from historical values of individual claims that is subject to the protective order?

A. I can only say my belief, because I have not been [23] involved in that particular aspect of our work. I have not done evaluations. My role has been more of an organizational one, of receiving the requests for information,

making sure that the information came in from the clients, that the records would be collected, and that the processes, the administrative processes would flow smoothly.

Q. Am I correct in understanding you to say that you personally will not be involved in the examination of any historical data, or the crunching of numbers through this statistical model in order to come up with a value?

A. No, I would not be involved in that. I will be involved essentially in helping review the questionaire which we designed, and in assisting claimants with obtaining necessary records and documenting the claim; and also interacting with claims resolution facility because of my proximity to it.

Q. Is it correct to say Dr. Glasser is instrumental to the role that Medical Claims Consultants intends to play and the service it provides in assessing value of these Dalkon Shield claims?

A. I think it is fair to say that, believe me, very instrumental.

Q. No further questions, Your Honor.

THE COURT: All right. Dr. Glasser, do you have any [24] questions of Mr. Lawson?

DR. GLASSER: No.

THE COURT: Thank you, sir.

(The witness stood aside)

THE COURT: Anything else?

All right, I will be glad to hear your comments now. I am sure Judge Shelley would, too.

MS THOMASON: Your Honor, I think procedurely it is okay for Mr. Glasser to make any argument.

THE COURT: Do you have any further argument you wish to make?

DR. GLASSER: I would make a brief comment, that we talked about the statistics, the statistical and epidemiologic model, which I think as in Robins' last submission response to my motion seemed to be the central sticking point, is that the model that we have is in fact a very general one, and is going to have to be adjusted to the guidelines that come out under options two and options three. The model is a very practical one. So, for example, any of the modeling work that I ever did was always one to isolate factors and not to focus on the exact value, to wit: The court, as I remember in the testimony, heard a variety of estimates which ranged from, well, I need not go into that, a range, enormous range, and an enormous set of different bases. So what I was working on was a fairly [25] general model, as a matter of fact, which was practically derived simply because of at the time I was working on these earlier ones were more or less directed towards the business at hand, of towards the hearing. For example, what if, what if a statute of limitations was evoked, or what if another set of circumstances? So, actually the models were generalizable so they could be bench marked to any particular set of values that might be determined. And so I think there is somewhat of a—I just want to erase what I think may be somewhat of a misperception that there is a model that grinds out a number for a case, or a client. And that is not, that is not the way it works, it will work, is that once option two and option three is announced, and that it will take into account the guidelines and the factors which are more weights, not dollars, of which the, we feel, that a piece of data is more important than another, that is to say a medical record is more important than another in substantiating that case. So in that sense, it is different than you put the numbers in, and it is going to come out and say this, this client's case is worth X dollars. It is going to be used to try to look at the very critical pieces of information that are needed in terms of that particular to substantiate that particular claimant's dossier.

THE COURT: Thank you.

MS THOMASON: Judge Merhige, Judge Shelley, I have a [26] number of comments I would like to make to the court because of the confusion proceduraly, the posture that we are in today. I sort of placed the burden on the court to recite where we have been, and where we are right now. I want to set a couple of things straight for the record. Dr. Glasser's papers, and I think part of his testimony today, indicate that he feels like he has been singled out for somekind of punitive treatment. That is not Robins' intent here. We have a concern that we thought should be brought to the court. The only procedural way we can do that is to try to force a protective order by a motion to show cause for a contempt, and no attempt was made to single—

THE COURT: No, I think he understands that. I hope he does.

We treated him especially genteely. I don't know how many cases, when a judge, where a judge calls the punitive defendant and says look, instead of issuing this show cause order I think you ought to—

MS THOMASON: I think we had, Your Honor, but—

THE COURT: It may be the gentility may dissipate.

MS THOMASON: Well—

DR. GLASSER: Your Honor, I was, unfortunately came in to that, your previous matter here, so psychologically I am not in a frame of mind to feel otherwise.

MS THOMASON: Your Honor, we had attempted to [27] accommodate Dr. Glasser as much as we can because we do not doubt at all his sincereity or integrity or anything he has said today in his paers. Our main position, main position is that we don't think Dr. Glasser has addressed the point that is our concern, that it is the Court's concern, and the trust's concern, that is, namely, that he had access

to this information. As little help as it may be to his process, it is just one little gear in this model, in this machine that he is using to crank out numbers, still use of that data is still a violation that there are already other services and experts out there trying to assist them, Dalkon Shield claimants that are anxious to have their hands on that same data. Your Honor, Dr. Glasser has stated in his papers, and again today, things like this: This information is not critical, this information, what he is doing at Medical Claims Consultants is not dependent on this information. It is not his primary or his main interest, but he, I think, in cross examination established clearly that the information he had access to, and that it is being used, however minimally, to help generate a claim value for individual claims, that can be, that is created by comparison with historical claims data.

Dr. Glasser also seems to think that because there aren't any guidelines yet for options two or options three [28] that what he has done, or what he contemplates doing can't violate the protective order, and that he anticipates when his guidelines come up, he is going to mold his model to fit them. I think that misperceives what the trust is going to do. I don't understand the trust to at any time reveal or publicize to any claimants the manner in which it is going to evaluate claims and the weight it is going to assign to certain values. I think certainly claimants will get clear instructions on how they are to proceed, but that the trust is exclusively going to use that historical data that is not publicized to anybody else to help it in its efforts to determine these values.

We perceived Dr. Glasser has a leg up on everybody else trying to beat the trust at its own game, so to speak, by perhaps quarreling with certain values in their negotiation, trying to up the values of certain claims.

Again, we don't attribute sinister motives to that, it is just a concern that he has access to this information and

no one else does. And that that is going to cause trouble for the trust in the future.

Your Honor, several times in Dr. Glasser's papers, and today, he has alluded to the hearing that we had on estimation in November of 1987. He seems to take the position that because that hearing was held in public in open court like this, that other experts testified about [29] those elements, that somehow what he is doing now is okay. I think the court will recall all of the documents that the parties filed pursuant or prior to estimation hearing were filed under seal. They remained under seal, and the testimony of the Court's pretrial order at that hearing specifically involved no discussion of individual claims. The issue before the court at that time was to assess and estimate the general liability that Robins had for the Dalkon Shield claims, and I don't believe that there was any testimony in public regarding anything that, any individual claim data.

Your Honor, in short, despite the good intentions of Dr. Glasser and Medical Claims Consultants, we simply don't perceive how it is possible for him to provide the services to Medical Claims Consultants and Dalkon Shield claimants that he professes to do without violating a protective order.

He has admitted that it is difficult, if not impossible, to distinguish between information that he knew prior to his involvement in this case, information that he gathered as an expert and is covered by the protective order, and information that he is getting out from other claimants because of his—it is impossible to make them separate those sources of information out. I think that it is a virtual admission of the violation of the protective [30] order here.

Technically, Your Honor, we are here on this motion for relief from the protective order. He seems to be saying, if I understand his papers and his testimony, that he doesn't really want relief from the order.

THE COURT: He says he doesn't need it.

MS THOMASON: Because he hasn't violated it.

Your Honor, I will close by saying, we are not convinced that this has not been violated, or it will not be violated in the future. We think that as well intentioned as it is is precisely the point of what they are doing, and we in any event do not think that relief from the protective order should be granted to Dr. Glasser. And that is all I have to say.

I believe if the Court is willing to entertain any further argument, that Mr. Sheppard on behalf of the trust would like to make some comments to the court. I might add that Robins would encourage the court to consider that because, although we are interested right now, are interested, our interests are rather attinuated, and we perceive a real concern here to the trust, and for that reason, I would urge the court to, and all of us to, to hear their position on this.

THE COURT: All right. All right.

MS THOMASON: Thank you, Your Honors.

[31] MR. SHEPPARD: Judge Merhige, Judge Shelley, I am Mike Sheppard, Director of the Dalkon Shield Claimants Trust. I apologize for being here without counsel, but as you know—

THE COURT: I don't know how you could do much better.

MR. SHEPPARD: Well, of course Mays & Valentine is counsel for A. H. Robins. We are between law firms, as you know, at the present time, and there was some confusion because of the way in which this motion came before the Court. So I apologize for that.

We have several concerns. We would voice the same concerns that counsel for A. H. Robins has voiced. And

I would like to point out two things in the agency agreement that I think go to the heart, or at least one thing that goes to the heart of this matter.

In paragraph 3 of section 1 of the agreement it is very clear that they are going to estimate the reasonable value of that particular claimant as compared to historical claims of others injured by using the Dalkon Shield.

We feel that that would not be possible were it not for use of confidential information in this case.

We would also like to point out that in the agency agreement, that the trust has not in fact, has a policy of not disbursing the money to any agent or to any attorney, [32] and therefore they are are basically telling the claimant, misleading claimants by saying they would collect the money from the trust individually.

We are very concerned about this matter. Mr. or Dr. Glasser said that he would re-evaluate his model based on information given by the trust under options two and three. At the present time there is a strong policy of the trust not to divulge any of the historical informatin which was used to come up with our guidelines on options two and options three. So I really feel that there may be a misapprehension on his part on the use of his model.

Are there any questions of the court on the position of the trust?

THE COURT: I think I understand it. Judge Shelley?

Thank you.

MR. SHEPPARD: Thank you.

THE COURT: Do you have anything else, Doctor? Go ahead and use the lectern. It is a serious matter.

DR. GLASSER: Yes, sir.

Firstly, I think that there will be some information available when I talked about looking at options two and op-

tions three, that it is my understanding that there would be a schedule that is going to be published for option two payments, and that is what I am referring to. And so, I believe at that time least I—at least I am glad to [33] qualify or make that very point. That is what I am referring to.

And because this will give us the graded break points at which the options two would be paid for as under the procedures of the claims resolution facility and the trust.

So that in that sense I take issue with this notion that there will not be information available. And I want to clarify in which sense we are going to use it.

Secondly, what we are talking about in the model is the factors that, the quality key factors that make a claim more or less valuable. Again, not the exact dollars.

And then thirdly, in the statistical model, when referring to what was in the open court, there were averages presented, and we are again not going on a model that takes the individual historical data, but rather the group averages, that is what the statistical epidemilogic approach is all about. Again, our model puts out those things, or has tried to help us isolate these things that are critical factors in the, in valuing a case, not the value, and I mean by critical factors, the timing, the magnitude of utilization of health services, hospitalization, doctor's visits, the competing risk problems, that is to say whether there were other conditions present, such as fibroids or tumors. And includes other demographic factors such as age and the number of children that may be in the family or not at the [34] time. So those are what we are thinking about in the model, qualitative factors that will happily lead us to focus on these things that are our primary purposes. And that it is—that since that we did approach the trust back then, because I was anxious, as we said in the letter, to explain what we are doing and to present that. I wanted to emphasize that I made this effort to be open and to

share any of this information and to have appropriate feedback.

What, but, of course, really I will say hurts at this point, I think as Linda said, people, that Robins did not mean that I should take this personally, but as I point—pointed out, of course I do, because it is a serious problem, and I know it is not necessarily personally against me per se, but is a serious problem. And so at that end I have been very anxious to again emphasize as in the past, we have maintained this kind of openness. And I don't believe that we are going to compromise the trust. And, I mean, I myself offered to go before the trust as I did want to make my services available to people. Others have had the opportunity to do it. I really haven't. And I am frankly very desirous of continuing my service and to stay within the environment of medical claims, and if the problem comes down to the model, then I would be willing to forego that if that is the sticky point. Because I don't think it is that essential to the services and the utility of the [35] services if that would satisfy the trust or the other people's concern.

Lastly, on the agency agreement, Dr. Lawson has advised me that that hasn't changed the method of—the whole thing has been changed so that that is no longer an issue.

THE COURT: All right.

Well, Judge Shelley and I both agree there certainly is no mensrea involved in any actions taken by Dr. Glasser. He never intended to do anything inappropriate or wrong.

He will not be relieved from the protective order. We will follow this up with a short memorandum. I want to get a list, and perhaps you can help us, of all of the experts who participated. You may have it easier than I, Ms Thomason, because you probably have a record of who was paid. We may have signed the order, but our view is that the

spirit of the protective order, if not the actual language, is that it is inappropriate for any expert retained and paid through the Court's auspices to utilize any information from whatever source that they gathered during their services as a court-appointed expert.

And we think it is really inextricably intertwined. We don't know how you can possibly separate it. A plan was formulated through, to a great extent in light of the information that was garnered by the McGovern experts. And [**36**] it really, Dr. Glasser and the other experts sort of, as Judge Shelley has suggested, is the camel with its nose under the tent, and that is not what we intended, but that it doesn't just apply to him.

Now, I can't tell you not to work with whoever you are working with. People have a right to work where they want to work. And how you are going to separate it, I don't know, Dr. Glasser. I don't want to see you hear again, and you don't want to be here again, I know that. But you are going to have to work some system out, and it may be that you just simply are not going to be able to do anything in connection with this. That goes for every other expert. We are now hearing rumors of people who were paid officers of the court offering themselves as experts and expert witnesses, and if there is a way for the court to enjoin them, I am going to enjoin them, because it is wrong. It is absolutely wrong. They will have an opportunity, of course, to be heard. We will get a memorandum out spelling out our view as to what the spirit of this protective order is.

Maybe we are partly to blame ourselves. Maybe we should have said in the very beginning, if you take a job here as an expert, you are forever out of the Dalkon Shield business. Except as may be requested by your particular clients, such as the claimants' committee. Except there isn't any claimants' committee any more. They are gone.

[37] So, in short, you are not in trouble, you are not relieved from the protective order, you have an advance notice as to what the memorandum is going to say, and you will just have to work it out from there. I am sorry that you were subjected to this. But you recognize that something that is this important to the trust—I am not discouraging anybody who wants to help the plaintiffs, I don't discourage that at all, but I worry somewhat about it because I don't think they are getting the help that I think they should be getting. As a matter of fact, I know they aren't because I know some people that are offering to help, and some of these people are absolutely incompetent. I know from my own experience. In any event, that is our position.

The motion to be relieved from the protective order is denied.

But don't let that bother you in any way.

We will get a memo out, and we may have to issue show cause orders to every expert as to why an injunction should not be entered prohibiting them. Now, they may come in with good legal arguments why the court can't do it or why they should not be prohibited from participating in any manner whatsoever in the Dalkon Shield.

MS THOMASON: Excuse me. If could ask a quick question, I think I understand the Court's remarks, however, I understand there are at least one, perhaps more [38] than one, experts that were involved in this proceeding that are now employed by the trust and, of course, are using that information to assist the trust.

THE COURT: I don't dare exclude it, but for the use of the trust, and if the trust wishes to retain Dr. Glasser, I would approve that, too.

MS THOMASON: Thank you Your Honor.

THE COURT: See if you can't get that list to us, though, Ms Thomason, at your early convenience. I am trying to

find out where I go from here. It has been a terrible day, terrible.

Mr. Lawson, thank you for coming down. We appreciate it.

We will get something out as quickly as we can. Thank you. Recess the court.

The foregoing is a true and correct transcript.

Gilbert Frank Halasz, RPR
Official Court Reporter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Case No. 85-01307-R

RETAINED PROCEEDINGS
(Judge Merhige)

In re

A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

APPLICATION TO EMPLOY EXPERTS

To: The Honorable Robert R. Merhige, Jr.
United States District Judge

The Committee of Representatives of Dalkon Shield Claimants (the "Committee", through its undersigned counsel, respectfully represents:

1. On August 21, 1985, A. H. Robins Company, Inc. (the "Debtor") filed a voluntary petition under Chapter 11 of the Bankruptcy Code.

2. On September 21, 1985, this Court signed an order authorizing the establishment of an official committee of representatives of Dalkon Shield claimants.

3. The Committee was appointed on March 20, 1986 by the United States Trustee as the official representative of the interests of Dalkon Shield claimants in this case.

4. By order dated March 21, 1986, the Court appointed Professor Frances McGovern as its expert adviser on all issues arising from the alleged injuries of Dalkon Shield [2] claimants seeking damages from the Debtor. The Court

has also noticed its intention to appoint five professionals and certain other non-professional personnel to assist Professor McGovern in the claims analysis process.

5. In order to participate in the claims analysis process as an effective representative of the interests of Dalkon Shield claimants, the Committee requires expert assistance apart from and independent of the experts retained by the Court, the Debtor and other interested parties. The Committee needs such assistance to formulate its own position and to evaluate the opinions of other parties or experts on issues arising from the alleged injuries of the Dalkon Shield claimants. With expert assistance, the Committee will be able to implement a project involving the research, the data collection and the data analysis it requires for its evaluation of Dalkon Shield claims.

6. Subject to the approval of the Court, the experts the Committee proposes to retain are Dr. David A. Grimes, Jay Howard Glasser, Ph.D. and Longbranch Research Associates, Inc.

7. Dr. David A. Grimes is well qualified to provide medical expertise on the kinds of injuries involved in Dalkon Shield litigation. He is a medical doctor specializing in obstetrics and gynecology and an experienced epidemiologist. He has served in that capacity for the Pregnancy Epidemiology Branch of the Centers for Disease Control, where he now holds [3] the position of Clinical Research Investigator. He is also an associate professor in both the Department of Gynecology and Obstetrics and the Department of Community Health at Emory University School of Medicine. His extensive writings for professional journals and the press on medical matters include articles on both intrauterine devices and pelvic inflammatory disease.

8. Dr. Jay Howard Glasser is a biostatistician. He received his Master of Science degree in biostatistics from Columbia University and his doctorate in experimental sta-

tistics from North Carolina State University and is presently an associate professor in the Biometry and Computer Services division of the School of Public Health at the University of Texas. In recent years, Dr. Glasser has served as consultant on biostatistical matters to numerous organizations and government agencies, including the National Center for Health Statistics, the National Academy of Science, the United Nations and the World Health Organization in Geneva, Switzerland. He has also served extensively on various national and state advisory and review committees, including the Family Planning, Special Review Committee, Office of Population, HHS, of which he was Chairman, and the Health Services Developmental Grant Review Subcommittee, National Center for Health Services Research (DHHS). Dr. Glasser's thorough and current familiarity with the medical literature concerning the Dalkon Shield and his experience in [4] drafting survey questionnaires make him especially qualified to assist the Committee with its work in evaluating the Dalkon Shield claims.

9. Longbranch Research Associates, Inc. (formerly Econometric Research, Inc.) ("Longbranch") is a company with a complete capacity for collecting, maintaining and analyzing a complex data base. It owns and operates a mainframe computer as well as a multiterminal microcomputer system. Longbranch is directed by Stephan Michelson, Ph.D., who has strong expertise in statistical analysis and broad experience in survey design and implementation. Dr. Michelson maintains a staff at Longbranch which is capable of supplying all necessary support services. Staff experience in the application of quantitative analysis in judicial proceedings goes back to 1969 and should be especially useful to the Committee in the context of evaluation of the Dalkon Shield claims.

10. As each of the experts which the Committee seeks to employ has a different type of expertise, there should be no duplication of services. But, in any event, the Com-

mittee will insure that there is no overlap in its utilization of its experts.

11. As requested by the Court, attached hereto as Exhibit A is an estimated budget for completion of the proposed project. Since the precise contours of the project are as yet undefined, the project budget cannot be determined conclusively [5] at this time. However, the estimate does represent an educated approximation of costs based on the experience of the experts with similar studies.

12. All compensation for services rendered and disbursements incurred by the Committee's experts shall be subject to the approval of this Court upon the filing of appropriate applications for allowance thereof pursuant to Sections 330 and 331 of the Bankruptcy Code and Bankruptcy Rule 2016.

13. To the best of the Committee's knowledge, neither Dr. Grimes, Dr. Glasser or Longbranch have any connection with the Debtor, creditors, any other party in interest, or their respective attorneys and accountants.

14. The Committee believes that its retention of Dr. Grimes, Dr. Glasser and Longbranch, *nunc pro tunc* to March 21, 1986, for the purpose intended on the terms and conditions described above would be in the best interests of the estate and its creditors.

WHEREFORE, the Committee requests that it be authorized to employ Dr. David A. Grimes, Jay Howard Glasser, Ph.D. and Longbranch Research Associates, Inc., *nunc pro tunc* to March 21, 1986, as experts to assist the Committee in the research, data collection, and the data analysis required for its evaluation of Dalkon Shield claims on the terms and conditions set forth in this application.

Respectfully submitted,

CADWALADER, WICKERSHAM & TAFT

Dated: Washington, D.C.
June 22, 1986

By: Mark C. Ellenberg
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Dated: Richmond, VA
June 12, 1986

By: Lawrence B. Cann, III
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Counsel for the Committee of Representativs of Dalkon Shield Claimants

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA

Richmond Division

Chapter 11

No. 85-01307-R

RETAINED PROCEEDING
(Judge Merhige)

In re

A. H. ROBINS COMPANY, INCORPORATED

Debtor.

EMPLOYER'S TAX IDENTIFICATION
No. 54-0486348

ORDER

From the files relating to Dalkon Shield claims and suits that were resolved prior to the commencement of this Chapter 11 case ("closed Dalkon Shield claims files"), Professor Francis McGovern, an expert appointed by the Court in this case, has selected files from which he expects to obtain information essential to the performance of his duties. Other closed Dalkon Shield claims files subsequently may be requested by Professor McGovern in the performance of his duties. These files currently are in the possession of the Aetna Casualty and Surety Company ("Aetna"), A. H. Robins Company, Incorporated ("Robins"), and counsel for plaintiffs and defendants in the individual actions.

Professor McGovern has been informed that certain closed Dalkon Shield claims files are subject to individual

confidentiality agreements entered by the parties at the time of their disposition. The Court, however, finds that the limited [2] disclosure as set forth herein is compelled by the overriding federal interest in facilitating a fair and expeditious resolution of these Chapter 11 proceedings. To ensure the confidentiality of all closed Dalkon Shield Claims files that have been or may be selected for review in this Chapter 11 case and to protect the privacy interests of the claimants whose files are so selected, it is hereby

ORDERED that the closed Dalkon Shield claims files, excluding any materials subject to the attorney-client or work product privileges, presently or subsequently selected by Professor McGovern, whether in the possession of Aetna, Robins or the parties' counsel, shall be produced to Professor McGovern at the time and place designated by him; and it is further

ORDERED that any closed Dalkon Shield claims file requested by Professor McGovern or subsequently ordered by this Court to be produced to any party-in-interest may be disclosed only to the following parties, their counsel and Court-approved experts and support personnel and to no other persons: (a) Robins, (b) Aetna, (c) the Official Committee of Representatives of Dalkon Shield Claimants, (d) the Official Unsecured Creditors Committee, (e) the Official Committee of Equity Security Holders, and (f) the Legal Representative for the Future Tort Claimants; and it is further

ORDERED that any person authorized by the preceding paragraph to examine the contents of closed Dalkon Shield Claims [3] files shall not disclose their contents, in part or in full, to any person not expressly authorized to such access by this or subsequent order of this Court.

Entered: July 10, 1986

Robert R. Merhige, Jr.
United States District Judge

NOTICE OF JUDGMENT OR ORDER
Entered on docket 7-10-86

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Chapter 11

No. 85-01307-R

RETAINED PROCEEDING
(Judge Merhige)

In re

A. H. ROBINS COMPANY, INCORPORATED
Debtor.

EMPLOYER'S TAX IDENTIFICATION
No. 54-0486348

ORDER

On July 10, 1986 the Court entered an order directing the production of certain closed Dalkon Shield files to Professor Francis McGovern. The production was made expressly subject to various conditions and restrictions outlined therein. In addition, the July 10th Order recited that Professor McGovern subsequently might request the production of other closed Dalkon Shield files to assist him in the performance of his duties in this case. Professor McGovern has now requested the production of approximately 2,000 additional closed claims files in the possession of The Aetna Casualty and Surety Company, Robins' defense counsel, and counsel for plaintiffs.

The parties have expressed their concern and the Court is cognizant about the cost of locating the currently [2] requested files among all the files. The Court finds it will be in the best interest of the debtor's estate for all of the

files currently in the custody of Robins' defense counsel to be delivered to a central location to permit Robins, under the supervision of Professor McGovern and the Examiner appointed by this Court, to identify and produce the files requested by Professor McGovern in order to minimize the cost of production and the inherent drain upon the debtor's estate.

In view of this Court's previous findings outlined in the July 10, 1986 Order, and in view of the Court's concern about confidentiality, and the need to preserve all of the information contained in the files requested by Professor McGovern as well as the information contained in all other files relating to Dalkon Shield claims, it is hereby

ORDERED that Robins' counsel involved in the defense of Dalkon Shield claims are directed to deliver all Dalkon Shield case files in their possession to Robins in care of Francis McGovern, at a place designated by him, where Robins shall remove all privileged materials, and it is further

ORDERED that the closed Dalkon Shield claims files requested from Aetna by Professor McGovern, excluding any privileged materials, presently or subsequently selected by Professor McGovern, shall be produced by Aetna to Professor [3] McGovern at the time and place designated by him; and it is further

ORDERED that any non-privileged portion of the Dalkon Shield case files requested by Professor Mcgovern or subsequently ordered by this Court to be produced to any party-in-interest may be disclosed only to the following parties, their counsel and Court-approved experts and support personnel and to no other persons: (a) Robins, (b) Aetna, (c) the Official Committee of Representatives of Dalkon Shield Claimants, (d) the Official Unsecured Creditors Committee, (e) the Official Committee of Equity Security Holders, and (f) the Legal Representative for the Future Tort Claimants; and it is further

ORDERED that any person authorized by the preceding paragraph to examine the contents of Dalkon Shield case files shall not disclose their contents, in part or in full, to any person not expressly authorized to such access by this or subsequent order of this Court; and it is further

ORDERED that this Order shall supersede all prior Orders relating to the preservation and location, including storage, of all Robins' Dalkon Shield case files; and it is further

[4] ORDERED that Robins is authorized to make all necessary arrangements and to pay all reasonable expenses necessary to insure full compliance with this Court's Order.

ENTERED: September 18, 1986

Robert R. Merhige, Jr.
United States District Judge

NOTICE OF JUDGMENT OR ORDER
Entered on docket 9-18-86
Eliza Bettener

WE ASK FOR THIS:

Clifford W. ????
Counsel for A. H. Robins Company, Incorporated

W. Scott ????
Counsel for the Aetna Casualty & Surety Company

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Chapter 11

Case No. 85-01307-R

Judge Merhige
(Retained Proceeding)

In Re:

A. H. ROBINS COMPANY, INCORPORATED,
Debtor.

PROTECTIVE ORDER

DEEMING IT PROPER SO TO DO, it is ADJUDGED and ORDERED that any and all material submitted or otherwise obtained by Professor Francis McGovern and/or other experts retained by Professor McGovern and authorized by the Court for the purpose of evaluating and sampling Dalkon Shield claims shall be deemed to be matters of strict confidentiality and shall include records of telephone inquiries, claim forms, medical records, financial records, correspondence or medical opinion letters and the like.

Notwithstanding the above, it is further Ordered that each claimant and his or her attorney shall, upon written request and upon proper identification, have access to the contents of his/her materials compiled in connection with the survey of the pending claims.

Any person authorized by the first paragraph herein to examine the contents of such materials shall not disclose

their contents, in part or in full, to any person not expressly authorized such access by this or any subsequent order of this Court.

[2] It is further Adjudged and Ordered that copies of data obtained by Professor McGovern in connection with the aforementioned evaluation and sampling which would assist the parties in evaluating the claims in this cause shall be forthwith delivered to the Debtor and counsel for each official Committee.

The information received from Professor McGovern pursuant to this Order shall not, under penalty of contempt, be disclosed in any manner whatsoever to any persons other than the experts of the respective parties, counsel for the Debtor, the official committees and such other parties deemed necessary by counsel to fulfill their obligation to their respective client and the Court.

Prior to any such disclosure counsel shall advise said experts, their agents, servants, employees and associates who may have access to the data aforementioned, of the contents of this Order and further advise him, her or them, as the case may be, that each is subject to the injunctive aspects of this Order. A similar obligation rests with counsel as to their own employees and associates.

Let the Clerk send copies of this Order to the parties designated herein.

Robert R. Merhige, Jr.
United States District Judge

Date: JUN 26 1987

NOTICE OF JUDGMENT OR ORDER
Entered on docket JUN 26 1987

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JOHN E. LAWSON, JR.
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MEMBERS OF VIRGINIA
AND D.C. BARS

December 28, 1988

Mr. Michael M. Sheppard
Director
Claims Resolution Facility
The Dalkon Shield Claimants Trust
P.O. Box 444
Richmond, Virginia 23208

Dear Mr. Sheppard:

Congratulations on your new position. It is always exciting to move on to something new and challenging—and your position should be very challenging!

It has been some time since I spoke with you about the address list of Dalkon Shield Claimants which you maintained in your former position as Clerk of Court. You may not recall, but I subsequently purchased a list of names and addresses in order to test an idea that a friend of mine at the University of Texas (Dr. Jay Glasser) and I had developed as a result of his observations as a Court-appointed expert working with Dr. Francis McGovern in the bankruptcy litigation which led to the creation of the Trust. The basic idea is to provide an efficient, equitable and cost effective service to assist Dalkon Shield Claimants with the evaluation, assembly and filing of their claims.

We believe that such a service should be socially responsible and operate in accordance with the following principles. First, the service should be open to all Claim-

ants. Claimants should not be screened for the purpose of identifying and selecting only high value cases. Second, there should be a level of service appropriate to any value or type of claim. Third, fees for professional and technical services should be proportional to the level of service or effort required to reach an appropriate settlement. And finally, Claimants should be provided sufficient medical and legal information to enable them to elect a settlement level appropriate to their circumstances.

[2] This service would benefit not only claimants, but also the Trust. It would insure that the claims were reviewed by medical and other health care experts, that the documentation for each claim was complete and that each Claimant was adequately informed of the options available to her (him). The Trust would be able to process such claims more efficiently and, thereby, disburse the funds more quickly to the beneficiaries. Moreover, if the response to this service is consistent with our market analysis, we believe that the lowered costs to Claimants of utilizing this service would put more of the money in the hands of the Claimants where it belongs.

As I indicated above, we tested our idea with a sample of the Claimants whose names and addresses we purchased. Our study focused primarily on the following issues.

1. What types of services would most Claimants require to successfully resolve their claims for injuries arising out of their use of the Dalkon Shield?
2. Must these services be provided only by attorneys?
3. Could these services be provided at less cost than the one-third fee normally charged by atorneys?

The results of our analysis follow.

1. TYPES OF SERVICES REQUIRED: Based on our survey of claimants, we have concluded that the services required by the majority of Claimants will be the following:

a. Identifying and evaluating the nature and extent of the injuries they sustained (including a medical review of the injuries);

b. Assembling and deciphering the necessary documentation (i.e., medical records) to substantiate the injuries sustained;

c. Preparing the claim forms, applications and other materials required by the Trust;

d. Filing their claim with the Trust;

e. Monitoring the progress of their claim as it is being processed by the Trust; and

f. Obtaining any additional materials or documentation required by the Trust to substantiate the claim.

[3] We believe that these services require as much (if not more) medical or health care expertise as legal expertise. In fact, a medical evaluation is essential if the causal nexus between the injury and the use of the Dalkon Shield is to be established.

2. MUST A CLAIMANT'S AGENT BE AN ATTORNEY? Based on our review of the documentation establishing the Trust and the procedures for resolving claims, we have concluded that the Claimant's agent or representative need NOT be an attorney, except in those cases in which the Claimant elects to litigate the claim (e believe that this will be a relatively small number).

3. FEES: As I have noted above, we believe that fees should be proportional to the level of service or effort required to reach an appropriate settlement. Our analysis of the professional and technical effort required to provide the services outlined above, assuming that an adequate number of Claimants with the full range of injuries respond to this service, suggests that the costs to the Claimants can be reduced significantly as compared to traditional tort fees. We believe that these basic professional and

technical services can be provided for sixteen percent (16%) of the Claimant's award. This fee is for professional and technical services only and does not include any direct costs or expenses for medical records, long distance telephone calls, or other similar costs of documenting a claim. The Claimant would be charged for these items.

For cases which require negotiation, arbitration, or litigation, we believe that a slightly higher fee may be warranted. Our analysis suggests that the provision of additional services beyond the basic level can be accomplished for a relatively modest marginal cost. We estimate the additional, or marginal, cost for those claims which require negotiation or arbitration would be nine percent (9%) of the Claimant's award, for a total of twenty-five percent (25%). We estimate the additional cost for those claims in which the Claimant elects to litigate would be seventeen percent (17%) of the Claimant's award, for a total of thirty-three percent (33%). We have arrangements with attorneys who will provide legal representation within these cost schedules for those cases which require a lawyer.

MEDICAL CLAIMS CONSULTANTS

As a result of our analysis, we organized MEDICAL CLAIMS CONSULTANTS (MCC) to assist Dalkon Shield Claimants with their claims. The principal officers of MCC have extensive contacts with the health care and legal community and are uniquely qualified to serve as Agents for Dalkon Shield Claimants. Jay H. Glasser, PhD, worked for over one and one-half years as a [4] Court appointed health and statistics expert to analyze Dalkon Shield claims. As part of his work he led an analytic team that linked previously settled claims information to estimate current claims values. His work on the Dalkon Shield concentrated on Claimants surveys, the classification of injuries and alternative causation. His team emphasized computer-based medical records review and the construction of claims pro-

files. Dr. Glasser is an Associate Professor of Biometry, at the University of Texas, School of Public Health, and serves as an expert consultant to the National Center for Health Services Research, as well as the United Nations program for Health Examination Surveys. John E. Lawson, Jr., MPH, PhD, JD, is a partner in the Fairfax, Virginia law firm of Lawson & Eickhoff; is a member of the Virginia and District of Columbia Bars; and is a practicing attorney before the U.S. Bankruptcy Court for the Eastern District of Virginia. Dr. Lawson also has considerable expertise in maternal and child health issues, particularly in the development of computer-based health information systems and the analysis of health and demographic data.

MCC was organized to provide the basic services that I described earlier in this letter, drawing upon the expertise of a variety of medical health care, legal and other professionals (e.g., physicians, nurses, health statisticians, epidemiologists, attorneys, and economists) to evaluate and document individual claims. Its strength lies in the fact that it brings together a broad range of technical expertise essential for identifying, establishing and documenting medical claims.

The services MCC proposes to provide to Dalkon Shield Claimants are based on the market survey we conducted among a sample of claimants in several states in order to ascertain and define the services they wanted. I am confident that the services and fees proposed by MCC will appeal to a broad array of claimants. Moreover, the services MCC will provide appropriately complement the traditional services provided by tort lawyers within the specific context of the Dalkon Shield Trust Agreement.

MCC purchased the names and addresses of Claimants in several states for marketing purposes and plans to offer its services to these Claimants. Moreover, we are working with several public interest groups to offer these services to other Claimants. However, we strongly believe that the

services MCC proposes to provide are more cost effective and more closely suited to the needs of claimants than the traditional approach. Accordingly, we believe that the interests of Dalkon Shield claimants would be best served if they were made aware of this [5] less costly, alternative service. Moreover, we believe that such services would have advantages for the Trust. Therefore, we would like to explore with you the possibility of your including some of our materials in a mailing to Dalkon Shield Claimants, or some other alternative which would permit us to gain access to a broader range of Claimants.

Time is of the essence in this matter. Claimants are now considering whether they should elect to take the $725.00 offered at the Option 1 level or hold out for the possibility of greater compensation for their injuries. We strongly believe that this decision should be an informed decision.

We are available to discuss this matter at your convenience. Please call me at 703-352-5880 so that we can arrange a meeting to discuss these matters.

Sincerely,

John E. Lawson, Jr.
John E. Lawson, Jr.

CONSTITUTIONAL PROVISION AND RULE OF COURT INVOLVED

United States Constitution, First Amendment

Congress shall make no law * * * abridging the freedom of speech * * *.

Federal Rule of Civil Procedure 26(c)

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.